Supreme Court, U.S.
FILED
FEB 12 2003
OFFICE OF THE CLERK

No. 02 1199

In The

Supreme Court of the United States

DARREL D. SMITH,

Petitioner,

v.

TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF, EDWARDS & HALE, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DARREL D. SMITH
1806 Rexford Drive #6
Las Vegas, Nevada 89104
702.737.7616
In Proper Person

109 pp

QUESTIONS PRESENTED

The Ninth Circuit erroneously decided this case on an issue that could not have decided the case. The court decided the issue of recusal on the initial basis for requesting recusal, not the final and actual basis for recusal discovered during the recusal rehearing. This is a far departure from the accepted and usual course of judicial proceedings, and it is subject to this Court's supervision.

As a result, the Ninth Circuit erroneously held that knowledge and opinions formed during a non-evidentiary hearing (which was vacated and remanded for an evidentiary hearing) and used to decide the evidentiary hearing were not an extrajudicial source – "a source outside the judicial proceeding at hand." See *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

As a consequence, the court has decided an important federal question in a way that conflicts with the relevant decisions of this Court, especially *Liteky*. It also conflicts with the Tenth Circuit which states that general bankruptcy information in the same case should not be used in evidentiary hearings. See *Frates v. Weinshienk*, 882 F.2d 1502 (10th Cir. 1989).

To uphold the Ninth Circuit would have far reaching results and would allow cases to be decided on evidence outside the record instead of evidence based on the record, as happened in this case. This would violate both the fundamentals of fair trial under due process and also the recusal statute – 28 U.S.C. § 455.

LIST OF INTERESTED PARTIES (SUPREME COURT RULES 14(b) AND 29.6)

Petitioner Darrel D. Smith is an individual. John Peter Lee, Ltd. and Edwards & Hale, Ltd. are law firms.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
LIST OF INTERESTED PARTIES		ii
TABLE OF AUTHORITIES		iv
I.	OPINIONS BELOW	1
II.	JURISDICTION	1
III.	RELEVANT STATUTES	1
IV.	STATEMENT OF THE CASE	2
V.	REASONS FOR GRANTING THE WRIT	4
	A. This Court Should Grant Certiorari Because The Ninth Circuit Erroneously Decided An Appeal On Issues That Could Not Decide The Appeal – Such A Holding Deviates From Accepted And Usual Course Of Judicial Proceedings Which Is Under The Supervision Of This Court	6
	B. This Court Should Grant Certiorari Because The Ninth Circuit Erroneously Holds That Opinions And Knowledge Acquired In A Vacated Non-evidentiary Hearing Can Be Used To Decide An Evidentiary Hearing – This Actual Bias Violates Constitutional Rights Of A Fair Trial And Due Process And Violates The Recusal Statute	11
VI.	CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Agricultural Labor Relations Bd., 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (CCADC 1976) 16

Cline v. Swayer, 600 P.2d 725 (Wyo. 1979) 12

Commonwealth v. Sirbaugh, 347 Pa.Supp. 154, 500 A.2d 453 (1985) 12

Continental Casualty Co. v. Goodwin, 180 Okl. 365, 69 P.2d 644 (1937) 14

Liteky v. U.S., 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) ..... *passim*

Frates v. Weinshienk, 882 F.2d 1502 (10th Cir. 1989) 9, 15

Hopt v. People, 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887) 14

In Re Joint E. & S. District Asbestos Litigation, 737 F.Supp. 735 (E. & S.D.N.Y. 1990) 17

In Re Smith, 305 F.3d 1085 (9th Cir. 2002) 4, 7

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) 16

United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) 15

United States v. Haldeman, 559 F.2d 31 (CCADC 1976) 16

Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985) 15

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 157(b)(2)(E) 1

28 U.S.C. § 158(a) 1

28 U.S.C. § 455 ..... 1, 5, 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1334(a) 1

OPINIONS BELOW

The Ninth Circuit's published opinion was filed on September 24, 2002, which is set forth in the appendix to this petition, p. 1a. The Ninth Circuit denied a timely petition for rehearing on November 14, 2002. P. 78a. The Ninth Circuit denied a supplemental petition on December 24, 2002, p. 30a. A motion to recall mandate and request leave of court to file a second petition was denied on February 6, 2003. P. 84a.

The Order of the United States District Court for the District of Nevada was filed August 24, 2000. P. 32a.

The ruling for the recusal hearing was on June 29, 1999, and it is set forth in a transcript. P. 39a.

II.

JURISDICTION

The Bankruptcy Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b)(2)(E) and 1334(a). The District Court and Ninth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 158(a), respectively. The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

III.

RELEVANT STATUTES

The actual bias and prejudice involved in this case result in violation of constitutional rights of due process and fair trial. In addition, these rights are involved in a recusal statute. The relevant statute is "28 U.S.C. § 455.

Disqualification of justice, judge, or magistrate," which is set forth in the appendix at p. 80a.

IV.

STATEMENT OF THE CASE

Petitioner Darrel D. Smith filed a petition for relief under chapter 11 of the Bankruptcy Code in 1991. Early in the bankruptcy proceeding, Smith requested the bankruptcy court to enforce a settlement agreement. The court enforced it but made changes to it requested by others. Smith appealed the order enforcing the modified settlement agreement because of the changes in the agreement. The district court ordered the bankruptcy order of enforcement vacated and remanded the matter for an evidentiary hearing.

At the end of the evidentiary hearing, the bankruptcy court ordered the enforcement of the settlement agreement on exactly the same terms as the judge had in the non-evidentiary hearing. The judge made a point that the agreement was being enforced on exactly the same terms because there was no need for the hearing even though an appellate court ordered an evidentiary hearing. (There was no "need" for the evidentiary hearing, according to the judge, because he had already made up his mind from a vacated and remanded non-evidentiary hearing – bias.) At that time, there was no indication that the judge had acquired knowledge and formed opinions in the non-evidentiary hearing that he used to make his decision in the evidentiary hearing. The order was appealed and affirmed.

During the court rulings on matters before it on February 23, 1999 and April 9, 1999, the bankruptcy judge

indicated that he used information from non-evidentiary hearings to decide the evidentiary hearing. Based on the apparent bias, Smith filed a motion to disqualify the judge.

During the recusal hearing on June 29, 1999, the judge made it absolutely clear that he formed his decision for enforcing the settlement agreement from knowledge acquired and opinions formed during the non-evidentiary hearing, not the evidentiary hearing. This is set forth during his ruling on June 29, 1999 as follows:

1. The judge only formed his opinion once during the reinterpretation non-evidentiary hearings prior to the evidentiary hearing.[1]

2. The judge does not feel that in *Liteky's v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), extrajudicial source applies to proceedings in bankruptcy, even independent evidentiary hearings.[2]

3. When questioned specifically about the use of an extrajudicial source, the judge said that he was not told by the appellate court to do away with them.[3]

4. Further, the judge refers to his "firm opinion" and "the opinion" during his ruling[4] – indicia of bias and prejudice, especially during a recusal hearing.

5. Furthermore, the judge, at the end of the evidentiary hearing, enforced the agreement without change

---

[1] Recusal hearing of June 29, 1999, see p. 45a.

[2] Recusal hearing of June 29, 1999, see p. 41a.

[3] Recusal hearing of June 29, 1999, see p. 52a.

[4] Recusal hearing of June 29, 1999, see pp. 44a-47a.

from the non-evidentiary hearing, including the changes made by the non-evidentiary hearing, and then sanctioned Smith for having the evidentiary hearing because it was unnecessary because the result was the same even though the appellate court ordered it.

Smith appealed the decision not to recuse on the basis of the judge's statements of February 23, 1999, April 9, 1999, and June 29, 1999.

The district court affirms the denial of the recusal request. Smith appeals to the Ninth Circuit.

The Ninth circuit affirms the decision of the lower courts and denies recusal; it only recites the statements from February 23, 1999 and April 9, 1999 as the basis for denying the recusal. *In Re Smith*, 305 F.3d 1085, 1091 including footnotes 9 and 10 – pp. 24a-25a. The circuit court did not refer to the June 29, 1999 hearing where the bias was clearly stated. As a result, the circuit court did not decide the case on the bias relied on in the appeal or briefs.

As a consequence, this petition for a writ was filed because this departs from the accepted and usual course of judicial proceedings and because the court's ruling conflicts with the extrajudicial rule of *Liteky* and the 10th Circuit.

V.

REASONS FOR GRANTING THE WRIT

This case presents two important issues: (1) whether an appellate court can decide an appeal on issues that

could not decide the appeal and (2) whether knowledge from and opinions formed during a non-evidentiary hearing (which was vacated and remanded for an evidentiary hearing) can be used to decide an evidentiary hearing. Under *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), knowledge and resulting attitudes from a proceeding not at hand is actual bias and prejudice under the constitution, which requires a fair trial and due process based on evidence presented (not from evidence from a prior vacated hearing), and under 28 U.S.C. § 455.

The Ninth Circuit erroneously decided the recusal appeal on an issue that could not decide the case. The appeal involved recusal regarding an enforcement of a settlement agreement, which included ancillary community property issues. **While the Ninth Circuit decided the recusal appeal on the evidence which induced the recusal motion (the ancillary sub-issues of community property), the statements by the judge during the recusal hearing clearly showed bias in enforcing the settlement, but the Ninth Circuit did not refer to the statements of clear bias during the recusal hearing**. To decide an appeal on a sub-issue which could not decide the appeal departs from the accepted and usual course of judicial proceedings.

The statement of the judge during the June 29, 1999 recusal hearing clearly shows the bias and must be considered in determining bias. A fair hearing is decided on evidence presented at the hearing. This is the foundation of our judicial system.

As a result, the Ninth Circuit erroneously holds that knowledge and opinions formed during a non-evidentiary hearing (vacated and remanded for an evidentiary hearing)

and used to decide the evidentiary hearing were not an extrajudicial source – "a source outside the judicial proceeding at hand" – for a subsequent evidentiary hearing. This conflicts with the *Liteky* case and the 10th Circuit.

Allowing extrajudicial source from a vacated non-evidentiary hearing to decide evidentiary hearings violates the constitutional rights of a fair trial and due process and violates the recusal statute.

This Court should grant certiorari in order to address the conflicts and in order to correct the Ninth Circuit's departure from the accepted and usual course of judicial proceedings.

A. This Court Should Grant Certiorari Because The Ninth Circuit Decided An Appeal On Issues That Could Not Decide The Appeal – Such A Holding Deviates From The Accepted And Usual Course Of Judicial Proceedings Which Is Under The Supervision Of This Court.

The Ninth Circuit erroneously decided the case on an issue that could not decide the case. The circuit court states that Judge Jones was not biased in ruling that the community property issue was to be decided by the state court instead of the bankruptcy court.[5] *This was not*

[5] These issues involved the place of trial, and the bankruptcy court decided to have the state court decide them after non-evidentiary hearings.

the bias issue on appeal. The issue on appeal was whether Judge Jones was biased when he held an evidentiary hearing to determine the terms of the settlement agreement.[6]

The bias that Smith appealed involved the meaning of a settlement agreement, not community property aspects involved in the place of trial. The community property aspects were only one of the precursors and factors which led to the discovery of bias involved in the evidentiary hearing when determining the meaning of the settlement agreement. It is the bias involved in the evidentiary hearing regarding the meaning of the settlement agreement that was appealed, not the non-evidentiary reinterpretation hearings involved in community property. See *Smith*, 305 F.2d at 1091, including footnotes 9 and 10 – pp. 24a-25a.

The February and April hearings in 1999 disclosed apparent bias with reference to community property, which was the basis of the Ninth Circuit's decision. This was the only basis of the Ninth Circuit's decision; the June 1999 hearing was not addressed in the decision.

The June 1999 recusal hearing went beyond the community property issues involved in the February and April hearings, and it directly set forth bias regarding the settlement appeal. Since the June 1999 recusal hearing was not a basis for the Ninth Circuit's decision, the decision

---

[6] This hearing involved the meaning of the terms of the settlement agreement, and this was initially decided by non-evidentiary hearings, but the appellate court remanded to the bankruptcy court for an evidentiary hearing. It is these hearings which are involved in this appeal.

was not based on the issue appealed, and the issue the Ninth Circuit decided did not decide the issue appealed – i.e., the bias involving the enforcement of the settlement agreement.

As a result of the disclosures of apparent bias during February and April hearings in 1999, Smith filed a motion of recusal, and Judge Jones responded to the allegations of recusal in the context of a recusal motion, and he unequivocally confirmed the suspicions of bias (and the basis for this bias appeal) involved in the settlement agreement, as follows:

1. Judge Jones made up his mind during the reinterpretation hearings regarding the changes he made to the settlement because he states that he made up his mind only once during the reinterpretation hearings.[7] ***This is the bias dealt with in the briefs.*** The bias results from Judge Jones forming an opinion only once during prior non-evidentiary reinterpretation hearings in Smith's bankruptcy and using it in the subsequent evidentiary hearing on the settlement agreement. Since he only formed the opinion once, he did not do it during the evidentiary hearing because he did it only during the prior reinterpretation hearing.

2. Judge Jones does not feel that *Liteky's* extrajudicial source applies to proceedings in a bankruptcy, even

[7] "The first time that I formed an opinion was when Ms. Allf on your behalf sought reinterpretation of – what I thought was reinterpretation of the settlement agreement; that's the only time I formed an impression." Transcript of June 29, 1999, see p. 45a.

independent evidentiary hearings.[8] Transcript of June 29, 1999, see p. 41a. But see *Liteky v. U.S.*, 510 U.S. 540, 544-545, 114 S.Ct. 1147, 1152, 127 L.Ed.2d 474 (1994). The Tenth Circuit states that general bankruptcy information in the same case should not be used in evidentiary hearings. See *Frates v. Weinshenk*, 882 F.2d 1502 (10th Cir. 1989). Not only are the preconceived opinions from Smith's non-evidentiary reinterpretation hearings, but they are from independent bankruptcy proceedings outside Smith's bankruptcy – the Tropicana bankruptcy. An extrajudicial source under any standard.

3. When questioned specifically about the use of an extrajudicial source, Judge Jones said that he was not told by the appellate court to do away with them.[9] Transcript of June 29, 1999, see p. 39a. This is no excuse. It isn't even the law.

4. Further, Judge Jones refers to his "firm opinion" and "the opinion" during his ruling. Transcript of June 29, 1999, see pp. 44a-47a. These are words of bias in recusal proceedings, and he uses them more than once in a recusal proceeding. It is important to note that "the" refers to one specific opinion, not a

---

[8] "First, with respect to the merits of the matter, if the *Leitke* [sic] case stands for the proposition that extra – I think I have to say I don't believe the *Leitke* [sic] case stands for the proposition that extra-judicial sources in a bankruptcy case include hearing other proceedings within the same case." Transcript of June 29, 1999, see p. 41a.

[9] "But the appellate court did not tell me to do away with understandings or recollections or impressions of proceedings prior to the appellate ruling; I don't believe that I saw that in the appellate ruling." Transcript of June 29, 1999, see p. 52a.

reformalization of an opinion from the evidence presented at the evidentiary hearing.

5. Furthermore, Judge Jones, at the end of the evidentiary hearing, enforced the settlement agreement without change from the non-evidentiary hearing, including the changes made by the non-evidentiary hearing, and he then sanctioned Smith for having the evidentiary hearing because it was unnecessary because the result was the same even though the appellate court ordered it.

These were not addressed by the Ninth Circuit, and as a result the appeal could not have been decided on the basis appealed and the appeal could not have been resolved on the community property issue which the Ninth Circuit based their decision because it is a different issue.

In conclusion, the terms of the changed settlement agreement could not be enforced without an evidentiary hearing because the appellate court vacated the non-evidentiary hearing enforcing it. **Since Judge Jones enforced the changed settlement agreement after the evidentiary hearing and since his only opinion was derived at the reinterpretation hearings, the only way he could enforce the changed settlement agreement was through his opinions from the prior reinterpretation hearings**. He rejected the evidence from the evidentiary hearing, and as a result, he nullified it. This is further substantiated by his comments during the recusal hearing: he rejects *Liteky*; he states that the appellate court did not tell him to do away with his extra-judicial source; he talks about his "firm opinion" and "the opinion" (which indicates only one opinion) which was recusal terms for bias; and he declares that there was no need for an evidentiary hearing and sanctions Smith for

having the hearing even though the appellate court ordered it.

The Ninth Circuit's use of only the February 23, 1999 and April 9, 1999 hearings as the basis for denying the recusal appeal with no mention of the June 29, 1999 hearing departs from the accepted and usual course of judicial proceedings as to deprive Smith of a fair trial and due process.

B. This Court Should Grant Certiorari Because The Ninth Circuit Erroneously Holds That Opinions And Knowledge Acquired In A Vacated Non-evidentiary Hearing Can Be Used To Decide An Evidentiary Hearing – This Actual Bias Violates Constitutional Rights Of A Fair Trial And Due Process And Violates The Recusal Statute.

Although litigants are constitutionally entitled to an impartial judge at all stages of proceedings in which they are involved, the law does not contemplate that to be impartial a judge must be totally ignorant of all the previous proceedings that have been conducted in a matter or of the surrounding facts. Just as a judge's participation in a prior case involving a party or a particular set of acts does not create an irrebuttable inference of judicial bias; the fact that a judge, by virtue of having presided over earlier proceedings in the same case, has some prior knowledge of facts concerning that case or of a party, does not, *without more*, give rise to a reasonable question as to the judge's impartiality. It is usually presumed that a trial judge, by virtue of his learning and experience, will consider only the relevant and properly adduced evidence in reaching a determination on the merits and that he will be

able to compartmentalize his knowledge of information about a proceeding in such a way as to exclude any incompetent evidence. As a result, the *mere participation alone* by a judge in an earlier proceeding does not suggest the existence of actual impropriety. See *Commonwealth v. Sirbaugh*, 347 Pa.Supp. 154, 500 A.2d 453, 549 (1985). However, "[a] judge may find it difficult to put *aside views formed during an earlier proceeding*. In that instance, we would expect the judge to heed the judicial oath and step down, but that does not always occur. If, through obduracy, honest mistake or simple inability to attain self-knowledge, the judge fails to acknowledge a disqualifying *predisposition* or circumstance, an appellate court must order recusal no matter what the source." *Liteky*, 114 S.Ct. at 1161. (Emphasis added).

Bias and prejudice denote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate – i.e., predisposition that is beyond what is normal and acceptable. See *Liteky*, 114 S.Ct. at 1155. "Prejudice involves a prejudgment." *Cline v. Swayer,* 600 P.2d 725, 729 (Wyo. 1979).

Rulings, opinions, remarks and comments may involve prejudgments, which form the basis for partiality. *Liteky*, 114 S.Ct. at 1157. In and of themselves, rulings *alone* almost never constitute a basis for partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky*, 114 S.Ct. at 1157. Even though a ruling *alone* may not be a basis for partiality, *remarks or comments* may be the basis for

partiality if they reveal an opinion or ruling that derives from an extrajudicial source or if they reveal a "closed mind." *Liteky*, 114 S.Ct. at 1152 and 1157. As a result, the fact that Judge Jones formed an opinion and ruled in the improper non-evidentiary hearing is not alone a basis for partiality motion, but ***the fact that his remarks disclosed that he had a fixed opinion from the non-evidentiary hearing and that he used (relied on) it in deciding the evidentiary hearing instead of forming an opinion on the basis of the evidence in the evidentiary hearing is a prejudgment resulting in prejudice***, and it requires recusal. The prejudgment and its use are clear because of the remarks and comments made by Judge Jones during the malpractice and recusal hearings, especially the recusal hearings which were ignored by the circuit court.

The reason that Judge Jones is so blatant about admitting prejudgments ("biases") is that he apparently believes, taking him at his word, that hearings within a case are not extrajudicial. Transcript of June 29, 1999, see p. 41a. *Liteky* points out that extrajudicial source doctrine, as applied to earlier proceedings, was not clearly understood and that rulings may be based upon extrajudicial knowledge and motives, and it states:

> We say that the doctrine was less than entirely clear in its application for several reasons. First, *Grinnell* (the only opinion of ours to recite the doctrine) clearly meant by "extrajudicial source" a source outside the judicial proceeding at hand – which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge (as are at issue here). Yet many, perhaps most, Courts of Appeals considered knowledge (and their resulting attitudes) that a judge properly

> acquired in an earlier proceeding not to be "extrajudicial." (Cites omitted).

Liteky, 114 S.Ct. at 1152. (Emphasis added).

An "extrajudicial source" is "a source outside the judicial proceeding at hand." *Liteky*, 114 S.Ct. at 1152. Judge Jones erroneously considered knowledge (and resulting attitudes) that he acquired in an earlier proceeding not to be "extrajudicial." It is clear that the Supreme Court meant that extrajudicial meant "outside the judicial proceeding at hand," not case, because it also used the term "proceeding," not case in its explanation that followed. *Liteky*, 114 S.Ct. at 1152. It is also important to note that extrajudicial includes knowledge and attitudes "properly acquired" from an earlier proceeding. See *Liteky*, 114 S.Ct. at 1155. As a result, knowledge and attitudes improperly acquired and relied on from a vacated and remanded non-evidentiary hearing would clearly be extrajudicial.

Judge Jones acquired his knowledge (and resulting attitudes) from an improper non-evidentiary hearing. The law is very clear that vacated and remanded hearings stand as though there had never been a hearing. See *Continental Casualty Co. v. Goodwin*, 180 Okl. 365, 69 P.2d 644, 645-646 (1937) (stating "[t]he case must be tried de novo" at 645); *Hopt v. People*, 120 U.S. 430, 442, 7 S.Ct. 614, 620, 30 L.Ed. 708, 712 (1887) (stating "the case was to be tried on the evidence, and that they were not to consider it with respect to any previous trial, but only on the evidence given on this trial").

When Smith requested that Jones clarify the use of his predisposition acquired in the improper non-evidentiary hearing, Judge Jones made it clear that he

could use his prejudgment, and he states "the appellate court did not tell me to do away with the understandings or recollection or impressions of the proceedings prior to the appellate ruling." Transcript of June 29, 1999, see p. 52a. Judge Jones was wrong; he was not allowed to use any information from the previously vacated hearing.

Judge Jones stated that he was not bias or prejudice because he had acquired the information and opinions during judicial proceedings (even though ruled improper), and as a result, he concluded that it was not an extrajudicial source. Transcript of June 29, 1999, see p. 41a. But this view is not in accord with the Supreme Court's *Liteky* case, which states that "extrajudicial source" is "a source outside the judicial proceeding at hand." *Liteky*, 114 S.Ct. at 1152 (1994); *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793 (1966). In the present case, not only was the information and opinions acquired outside the judicial proceeding at hand, it was acquired during an improper non-evidentiary hearing. Knowledge (and resulting attitudes) acquired in general bankruptcy proceedings cannot be used to *prejudge* adversarial proceedings. See *Frates v. Weinshienk*, 882 F.2d 1502, 1504 (9th Cir. 1989). As a result, the Ninth Circuit is in conflict with this Court and the Tenth Circuit. The *Frates* case is exactly like this case, except that the prior decision was vacated in the present case. As a result, the present case is even more egregious.

The admissions of Judge Jones shows actual bias and prejudice which violates constitutional rights of a fair trial and due process and violates the recusal statute – 28 U.S.C. § 455. *Walberg v. Israel*, 766 F.2d 1071, 1076-1077 (7th Cir. 1985) (emphasis added), states:

> [I]nsofar as the statutes require recusal for actual bias or prejudice as distinct from a mere appearance of bias or prejudice. See *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981) (per curiam) (which incidentally was a civil rather than criminal case), they are declaratory of *constitutional requirements*. See, e.g., *United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976); *Knapp v. Knisey*, 232 F.2d 458, 564 (6th Cir. 1956).

Peters v. Kiff, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83, 93, states:

> Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. . . . As this Court said in *In re Murchison*, supra, '[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' 349 U.S. 136.

"[P]rejudgment of testimony is more than a mere appearance of bias; it evidences actual bias." *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151, 157 (1981). A judge's comments are disqualifying when they connote fixed opinions – "a closed mind on the merits of the case." See *United States v. Haldeman*, 559 F.2d 31, 136 (CCADC 1976). Accordingly, *an admitted prejudgment is actual prejudice, which results in the ultimate denial of due process and a fair trial resulting in required recusal.* As a result, Judge Jones should be recused.

In regards to the settlement agreement, Judge Jones specifically admitted that he formed a firm opinion (Transcript of June 29, 1999, see p. 46a) for the first and only

time during the improper non-evidentiary hearing (Transcript of June 29, 1999, see p. 45a), which was the basis for ruling on the settlement agreement. With actual bias and prejudice, there is no discretion. Recusal and vacation of orders is required. *In Re Joint E. & S. District Asbestos Litigation*, 737 F.Supp. 735, 742 (E. & S.D.N.Y. 1990) ("disqualification . . . is a matter for the exercise of discretion by the district judge, unless actual bias has been demonstrated").

VI.

CONCLUSION

The Ninth Circuit's decision is at odds with this Court's *Liteky* case and with the Tenth Circuit. This Court should grant the petition for a writ of certiorari in order to restore uniformity and to correct the Ninth Circuit's departure from the accepted and usual course of judicial proceedings by exercising this Court's supervisory powers.

To uphold the Ninth Circuit would allow cases to be decided on evidence outside the record instead of evidence based on the record, as happened in this case. This would violate both the fundamentals of fair trial under due process and also the recusal statute.

Knowledge acquired and opinions formed during vacated non-evidentiary hearings should not be allowed to be the basis for deciding an evidentiary hearing. Constitutional rights of a fair trial and due process are too

important. This should not happen under our system of justice requiring impariality.

Respectfully submitted,

DARREL D. SMITH
1806 Rexford Drive #6
Las Vegas, Nevada 89104
702.737.7616
In Proper Person

APPENDIX

305 F.3d 1078

In re Darrel D. SMITH, Debtor.
Darrel D. Smith, Appellant,

v.

Edwards & Hale, Ltd., Appellee.
Darrel D. Smith, Appellant,

v.

John Peter Lee, Ltd., Appellee.
Darrel D. Smith, Appellant,

v.

Tom Grimmett, John Peter Lee, Ltd., Nancy L. Allf, Edwards & Hale, Ltd., Appellees.

Nos. 00-17260, 00-17274 and 01-16531.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 2002.

Filed Sept. 24, 2002.

Darrel D. Smith, Pro Se, Las Vegas, NV; David Mincin, Law Offices of Richard McKnight, P.C., Las Vegas, NV, for the debtor-appellant.

Denise H. Abramow (briefed), Ty E. Kehoe (argued), Shea & Carlyon, Ltd., Las Vegas, NV, for creditor-appellee Edwards & Hale, Ltd.

Paul C. Ray, John Peter Lee, Ltd., Las Vegas, NV, for creditor-appellee John Peter Lee, Ltd.

Appeal from the United States District Court for the District of Nevada; Howard D. McKibben, District Judge,

Presiding, Johnnie B. Rawlinson, Circuit Judge, Presiding. D.C. Nos. CV-S-99-1761-HDM, CV-S-99-01114-KJD.

Before: HUG, CUDAHY,* and TASHIMA, Circuit Judges.

CUDAHY, Circuit Judge.

Darrel D. Smith, a Chapter 7 debtor, is appealing the decisions of the district courts affirming: (1) the bankruptcy court's award of attorneys' fees to the law firm of Edwards & Hale, Ltd. (E & H), debtor's special counsel in a 1992 state court action; (2) the bankruptcy court's award of certain administrative fees and costs to Smith's chapter 11 counsel, John Peter Lee, Ltd., (JPL); and (3) the bankruptcy judge's refusal to recuse himself. Under the somewhat convoluted facts of this case, we affirm the various awards of attorneys' fees. We also affirm the denial of the recusal motion. Although these lawsuits present some valid issues, much of the fee litigation was occasioned by a stubborn refusal of the debtor to recognize valid claims by attorneys; his continuing battles with his lawyers have been extraordinarily wasteful of the resources available in bankruptcy.

I.

A. General Background

Smith filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on March 21, 1991. He

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

retained JPL as Debtor's counsel. On January 11, 1994, the bankruptcy court approved Smith's Third Plan of Reorganization. The Plan provided for three avenues for the payment of claims. First, funds could be paid out of the proceeds of Smith's state law claims against a group of defendants arising out of his community property claims against his former wife's property. E & H was retained for this litigation. Second, funds could be paid out of proceeds from the sale of reproductions and prints of Smith's Maxfield Parrish painting, *Daybreak*. Third, if sufficient funds were not raised from either of these two sources within a specified time, the Plan provided that Smith would sell *Daybreak*. As things turned out, Smith could not raise sufficient funds employing the first two methods. The state law litigation produced only $80,000 instead of the $9 million estimated by Smith. Smith also gave up selling the prints of *Daybreak* because the sales of the prints would not return a net profit after expenses. At the same time, Smith became unwilling to sell the painting itself.

Smith's Plan specifically authorized the bankruptcy court to convert his case to Chapter 7 if he defaulted under the terms of the Plan. When Smith defaulted by not selling *Daybreak*, his case was therefore converted to a Chapter 7 proceeding and a trustee was appointed. On February 16, 1996, the bankruptcy court ordered the sale of *Daybreak* at public auction. This order was carried out and the painting sold at auction for $3.9 million, net of buyer's premium and applicable state and local taxes. Under the order of the court, Smith is to receive any funds in excess of bankruptcy claims and administrative fees and costs. Smith has also received authorization from the bankruptcy court to use the excess funds to purchase another

Maxfield Parrish painting and to fund certain litigation, including his challenges to the fee awards granted to E & H and JPL. Smith had appealed the conversion of his case to Chapter 7, as well as the bankruptcy court's approval of the sale of *Daybreak,* but these appeals have been unsuccessful.

B. Fees awards to Edward & Hale, Ltd.

For its work on the state litigation, the bankruptcy court granted four separate fee applications by E & H, totaling approximately $175,000. After the bankruptcy case was converted to Chapter 7, E & H hired Shea & Carlyon, Ltd. to recover its fees as administrative expenses. Although Smith appealed every order relating to fees and expenses awarded to E & H, Shea & Carlyon was successful in defending E & H's fee awards against all challenges. E & H recovered approximately $175,000, but it also sought reimbursement for the fees and costs it incurred in defending its fee awards against Smith's challenges. In this connection, the bankruptcy court awarded E & H additional fees of $43,587 and costs of $3,777 by order entered November 23, 1999. The bankruptcy court also found that the proceedings involving fees had reached the stage of frivolousness. The court noted that its award of fees to Smith's current counsel (Law Offices of Richard McKnight, P.C.) was contingent upon the award of fees to the other professionals in the case, which included E & H and JPL. Thus, the bankruptcy court found itself awarding fees based on applicable bankruptcy law, contract law and Nevada state law. By order dated October 10, 2000, the district court affirmed the awards of fees based on bankruptcy law and on contract law and Smith now appeals. He does not challenge

the reasonableness of the amount of the fee awards, but rather the legal basis for the awards.

C. Fee Awarded to John Peter Lee, Ltd.

JPL was awarded more than $700,000 for services performed while counsel to Smith. JPL sought additional fees for services allegedly rendered after it withdrew as debtor's counsel. In this connection, JPL filed four fee petitions, all of which were opposed by Smith, but the bankruptcy court granted all of JPL's fee applications, at least in part. Smith appealed the partial grant of the first fee application to the district court. The district court reversed and remanded the case to the bankruptcy court to make more detailed findings to support the fee award. On remand and after an evidentiary hearing, the bankruptcy court reaffirmed all its earlier fee awards and awarded new fees to JPL for the additional fee litigation, resulting in a total award of $353, 801.40. Smith filed a second appeal to the district court, and that court affirmed the bankruptcy court's fee rulings. Smith now appeals to this court, and similarly to his appeal of the fees awarded to E & H, Smith does not challenge the reasonableness of the amount of the fee awards but does question the legal basis for the awards.

D. Motion to Recuse

In 1992, Smith filed a motion, in the bankruptcy court, to enforce a written settlement agreement, which resolved his claims against his former wife's (Mitzi Briggs's) property. On July 16, 1992, following oral arguments, Judge Jones enforced the agreement with some modifications. Smith appealed with respect to those

modifications. On February 10, 1994, the district court vacated the bankruptcy court's order and remanded with instruction to hold an evidentiary hearing. After the evidentiary hearing, Bankruptcy Judge Jones reaffirmed his ruling, and Smith did not appeal.

In 1999, Smith, who had been represented during this litigation by JPL, filed malpractice claims against that law firm. During the hearings on the malpractice claims in February and April 1999, Smith alleged that Judge Jones then for the first time indicated that he had formed a fixed predisposition during the 1992 hearing with respect to the settlement (then the subject of litigation); this mindset was still in effect during the 1994 evidentiary hearing. Smith filed a motion to disqualify Judge Jones on June 1, 1999, but the bankruptcy court denied Smith's motion for recusal. On August 30, 2000, the district court affirmed. Smith now appeals again.

II.

This court has jurisdiction under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291 since this is an appeal from the final judgments of two district courts. We review de novo the district court's decision on appeal from a bankruptcy court. *See Gruntz v. County of Los Angeles (In re Gruntz),* 202 F.3d 1074, 1084 (9th Cir.2000) (en banc). We apply the same standards of review that govern the district court's review, *Ting v. Chang (In re Chang),* 163 F.3d 1138, 1140 (9th Cir.1998), giving no deference to the district court's decision, *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir.2001). A bankruptcy court's award of attorneys' fees will not be disturbed on appeal absent an abuse of discretion or an erroneous application of law. *In re*

Nucorp Energy, Inc., 764 F.2d 655, 657 (9th Cir.1985). A bankruptcy court's denial of a recusal motion is also reviewed for abuse of discretion. *United States v. $292,888.04 U.S. Currency*, 54 F.3d 564, 566 (9th Cir.1995). Questions of law are reviewed de novo. *Nucorp*, 764 F.2d at 657.

A. Attorneys' Fees

Smith opposes the fees awarded to E & H and JPL on both general and specific grounds. Smith's general objections to the fee awards require an analysis of how the Bankruptcy Code provides compensation for attorneys working on a case.

1. Analytical Framework for Attorney Compensation

Smith argues that 11 U.S.C. § 330(a) does not permit the award of fees to Chapter 7 or Chapter 11 debtor's attorneys. Thus, he argues, the bankruptcy court was not authorized to award fees to either E & H or JPL who served in that capacity. Even if section 330(a) does allow such an award of fees, Smith argues that the fee awards cannot be supported under the benefit analysis approach employed in *Pfeiffer v. Couch (In re Xebec)*, 147 B.R. 518 (9th Cir. BAP 1992). We address these contentions in turn.

Section 330(a) of the Bankruptcy Code governs the compensation of officers and professionals working on a bankruptcy case. Prior to 1994, section 330(a) provided that:

> After notice to any parties in interest and to the United States trustee and a hearing, . . . the

> court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title [which authorizes the trustee or creditors' committee to employ attorneys and other professionals], *or to the debtor's attorney* –
>
> > (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
> >
> > (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a) (1988) (emphasis added). Subsequently, Congress passed the Bankruptcy Reform Act of 1994 (Reform Act). The Reform Act renumbered various provisions and substituted the following relevant provisions in section 330:

> (a)(1) After notice to the parties in interest and the United States trustee and a hearing, . . . the court may award to a trustee, an examiner, a professional person under section 327 or 1103 –
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

(a)(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –

. . .

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

. . .

(a)(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for –

(i) unnecessary duplication of services; or

(ii) services that were not –

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(a)(4)(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

. . .

(a)(6) Any compensation awarded for the preparation of a fee application shall be based on the

> level and skill reasonably required to prepare the application.

11 U.S.C. § 330(a) (1994) (emphasis added).

Because the Reform Act removed the phrase "debtor's attorney" from what is now section 330(a)(1) and added subsection (a)(4)(B), which expressly authorizes awards of reasonable compensation to debtor's attorneys only in Chapter 12 and 13 cases, both the Fifth and the Eleventh Circuits have held that section 330(a) precludes the award of administrative fees to counsel for Chapter 7 or 11 debtors. *See In re Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Product, Inc.),* 197 F.3d 1354, 1356-57 (11th Cir.1999) (so holding); *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.),* 157 F.3d 414, 425 (5th Cir.1998) (same).[1] In contrast, this circuit, as well as the Third Circuit, has gone the other way. *See In re Top Grade Sausage, Inc.,* 227 F.3d 123 (3d Cir.2000) (holding that debtors' attorneys remain eligible, even after the 1994 amendments, for award of compensation from bankruptcy estate for services rendered and expenses incurred); *United States Trustee v. Garvey, Schubert & Barer (In re*

---

[1] Attorneys for a Chapter 11 debtor can still be paid under the Fifth and Eleventh Circuit's approach since they would presumably be "professional persons" employed by a trustee under section 327 if they were retained by a debtor-in-possession in a Chapter 11 case. The reason for this is that a debtor-in-possession has all of the rights and powers of a trustee, see 11 U.S.C. § 1107(a), which includes the power to employ professional persons under section 327. Once a *trustee* has been appointed, however, such attorneys, in the Fifth and Eleventh Circuits, would not be compensated even if they provided an identifiable, tangible and material benefit to the estate. *See, e.g., In re Canton Jubilee, Inc.*, 253 B.R. 770, 779 (Bankr.E.D.Tex.2000) (so holding).

Century Cleaning Services, Inc.), 195 F.3d 1053 (9th Cir.1999) (same). *See also In re Ames Dep't Stores, Inc.,* 76 F.3d 66, 72 (2d Cir.1996) (stating that the court was "inclined to agree" that debtor's attorneys were still eligible to receive compensation for their services and expenses after the passage of the Reform Act). Smith urges this panel to reconsider *Century Cleaning,* but he raises no argument that was not considered in Judge Thomas's vigorous dissent in *Century Cleaning.* This panel, of course, may not overrule a prior panel of this court, and if we could, Smith offers no persuasive reason why we should.

Smith also argues, somewhat more persuasively, that the bankruptcy court improperly applied *In re Xebec,* 147 B.R. 518 (9th Cir. BAP 1992), in awarding fees to E & H and JPL because their preparation of fee applications and their defense of fee awards did not confer a benefit upon the bankruptcy estate.

In *Xebec,* the bankruptcy appellate panel held that a debtor's attorney can receive compensation for services rendered after a trustee has been appointed only if the debtor's attorney can demonstrate that the services have provided "identifiable, tangible and material benefit to the estate," thus adopting what is called the "benefit analysis" approach. *Xebec,* 147 B.R. at 523. In applying benefit analysis, the panel held that a bankruptcy court should examine: (1) whether the services duplicated services rendered by the trustee, (2) whether the services impeded or assisted the administration of the estate and (3) whether the debtor's attorney's actions were consistent

with the debtor's duties under 11 U.S.C. § 521.[2] *Id.* Xebec interpreted an older version of section 330(a), a version in effect prior to amendment by the Reform Act. Now that much of *Xebec* has been codified in section 330(a)(4)(A), it is now that provision and not *Xebec* that governs whether a bankruptcy court may award compensation. *See In re Top Sausage,* 227 F.3d at 132 (holding that debtor's attorney's fee application would be evaluated "pursuant to the standards set forth in § 330(a)(4)(A) and not by some heightened standard or hindsight").

As earlier noted, section 330(a)(4)(A) provides that:

> Except as provided in subparagraph (B) [which involves chapter 12 and 13 cases], the court shall not allow compensation for –
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were not –
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A) (1994). Under this provision, a bankruptcy court cannot award fees if the services rendered were unnecessarily duplicative. Further, the bankruptcy court may not award compensation if the services rendered were not reasonably likely to benefit the estate or were unnecessary for the administration of the estate.

---

[2] 11 U.S.C. § 521 requires a debtor to file a schedule listing claims and assets of the bankruptcy estate, and, where a Trustee is appointed, to aid the Trustee in administering the bankruptcy estate.

Therefore, under section 330(a)(4)(A), a bankruptcy court may award compensation if the services rendered were not unnecessarily duplicative and if the services rendered were both reasonably likely to benefit the debtor's estate and were necessary for the administration of the case.

Section 330(a)(4)(A) differs from the benefit analysis of *Xebec* in three ways. First, except for fee awards in Chapter 12 and 13 cases, the new provision applies to *all* awards of reasonable compensation. Unlike *Xebec,* section 330(a)(4)(A) makes no distinction between compensation for services rendered before or services rendered after a trustee has been appointed. *Cf. Xebec,* 147 B.R. at 523 (noting that "there is a split in the case law on the issue of whether the debtor's attorney may be compensated for services rendered after the appointment of a Chapter 11 trustee" and applying benefit analysis to awards of compensation). A fee application seeking compensation for legal work done after a trustee has been appointed, however, does requires [sic] more scrutiny by the bankruptcy court because such work may be unnecessarily duplicative of work done by the trustee. Second, section 330(a)(4)(A) does not expressly require the debtor's attorney's actions to be "consistent with the debtor's duties under 11 U.S.C. § 521," although, if a debtor's attorney has taken actions that aid the debtor in complying with section 521, these actions usually also aid in the administration of the case. *See Xebec,* 147 B.R. at 523-24 (stating that "services rendered by the debtor's attorney which comply with the debtor's duties under § 521 should be presumed to be reasonable [and] necessary, and therefore, compensable under § 330"). Finally, section 330(a)(4)(A) provides clarification by requiring only that the services rendered be "reasonably likely to benefit to the debtor's estate," 11

U.S.C. § 330(a)(4)(A)(ii)(I) (1994), and does not require that the services actually provide an "identifiable, tangible and material benefit to the [debtor's] estate," *Xebec,* 147 B.R. at 523. *But see Xebec,* 147 B.R. at 524 (stating that "we acknowledge that [ ] benefit analysis does not require that the services rendered by the debtor's attorney be successful in every circumstance"). Thus, services that are reasonably likely to provide an identifiable, tangible and material benefit to the debtor's estate can be compensated, even if they do not actually provide such a benefit (and as long as such services meet the other requirements of section 330(a)). Because section 330(a) provides the legal standard for evaluating all compensation awards to bankruptcy attorneys,[3] to the extent that *Xebec* may be inconsistent with section 330(a)(4)(A), *Xebec* has been superseded and is overruled.

Having established the analytical framework for attorney compensation, we turn to Smith's objections to the fee awards in the case before us.[4] We specially note that the Chapter 7 trustee has not joined in Smith's objections to the fee awards.

---

[3] Because it is not relevant to this appeal, we do not address section 330(a)(3), which lists the nonexclusive factors that a bankruptcy court must examine to ensure that the award of compensation is reasonable, and sections 326 and 328, which impose limitations on the compensation of trustees and professional persons.

[4] The district court addressed some of the fee awards under the pre-1994 version of section 330(a) because the bankruptcy case here was filed in 1991. We believe that the 1994 version of section 330(a) should apply because the case was converted to Chapter 7 in 1995. The fee awards that Smith is appealing were for services rendered after the case was converted. In any case, the result under the pre-1994 version of section 330(a) and our earlier caselaw would be the same.

2. Fees to Edward & Hale, Ltd.

Smith opposes the award of fees to E & H for legal services performed after his case was converted to Chapter 7. These fees fall into three broad categories: (1) fees arising from E & H's preparation of its fee applications, (2) fees arising from E & H's defense to Smith's challenges of the fee awards and (3) fees for miscellaneous matters including case and asset administration and for opposing Smith's motion to disqualify Judge Jones.

The fees for miscellaneous matters can be affirmed because they constituted reasonable compensation for services that were not unnecessarily duplicative of services performed by the trustee or JPL, were reasonably likely to benefit the debtor's estate and were necessary for the administration of the case. For example, E & H and JPL both filed briefs opposing Smith's motion to recuse Judge Jones, but their briefs on this issue had minimal overlap. Thus, there was no unnecessary duplication of services. Further, resolution of the recusal motion was necessary for the administration of the case and provided a benefit to the debtor's estate. It is a benefit to the estate, that absent a ground for recusal, continuity of court supervision of the estate be maintained. All parties to a bankruptcy case benefit from avoiding wasteful duplication of scarce judicial resources, which necessarily accompanies the transfer of a case from the assigned judge, who is familiar with the case, to a new judge.[5]

---

[5] In this case, if Smith had succeed [sic] on his motion, almost the entire proceeding would have to be nullified and the case would have had to be reheard by a new judge. This would have imposed additional costs and expenses that would have reduced the bankruptcy estate.

Whether the other fees were justifiable may require a somewhat more complex analysis. Smith argues that E & H cannot be compensated for its preparation of fee applications because preparing and filing a fee application is a service that solely benefits the law firm and not the estate. Section 330(a), however, expressly contemplates compensation for preparation of fee applications. *See* 11 U.S.C. § 330(a)(6) ("Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application."). Smith also contends that since the work done to prepare (and defend) the fee application occurred after his case had been converted to Chapter 7 and a trustee was appointed, the work was not compensable because it solely benefitted the law firms involved. *See In re Melp, Ltd.*, 179 B.R. 636, 640-41 (E.D.Mo.1995) (holding that, as a matter of law, work performed by debtor's attorney after operating trustee was appointed in no way benefits the estate and thus is not compensable under the benefit analysis articulated in *Xebec*). *Melp,* however, is not particularly helpful because it analyzed the pre-1994 version of section 330(a) and, as noted above, section 330(a) now provides the controlling analytical scheme for evaluating all fee awards.

Here, the preparation of fee applications was necessary for the administration of the case and provided a direct benefit to the estate because those services aided the trustee in determining the allocation of administrative fees. And E & H was entitled to administrative fees from the bankruptcy estate for services that E & H performed for Smith *prior to* the conversion of his case to a Chapter 7 case. Further, E & H's work on its fee applications was compensable because E & H's work was not an unnecessary

duplication of services performed by the trustee or other officers. Finally, as noted above, section 330(a) expressly provides for the compensation for preparation of fee applications. Thus, the fee awards to E & H for preparing its fee application must be affirmed.

While section 330(a) expressly contemplates compensation for fee preparation, it does not mention compensation for other services associated with the preparation of fee applications, such as litigation in defense of fee applications. Section 330(a) does not, however, forbid compensation for those services as long as they meet all of the requirements of the section. Although the statute is silent on whether litigation of fee awards is compensable, we have previously addressed this issue. In *Nucorp,* we held that services related to the preparation of fee applications are "actual and necessary services" for the purposes of section 330(a). We also stated that time spent litigating fee awards should be compensable. *See Nucorp,* 764 F.2d at 660-61. Failure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally. *Id.* at 661.

While *Nucorp* suggests that time and expenses spent litigating a fee application may be compensated, in *Boldt v. Crake (In re Riverside-Linden Investment Co.),* 945 F.2d 320, 323 (9th Cir.1991), we rejected the *per se* award of administrative fees arising from litigation of a fee application. We distinguished *Nucorp* on the basis that "[u]nlike the presentation and preparation of the fee application itself, there is no statutory or Bankruptcy Rule requirement that attorneys for the debtor oppose objections [by

other parties] to[their] fee application." *Id.* We were concerned that, under a *per se* rule awarding litigation expenses, attorneys would be encouraged to assert meritless fee requests because they could recover fees incurred in opposing objections to their meritless fee request. *Id.* However, we declined to adopt a rule rejecting an award of litigation fees based on this rationale. *See id.* ("We do not decide whether the litigation of a fee application under some other set of circumstances may be found necessary within the meaning of Section 330(a)."). Thus, to be compensated for the time and expenses spent litigating a fee application, the fee applicant must demonstrate that the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A) *and* that its case exemplifies a "set of circumstances" where the time and expense incurred by the litigation is "necessary" within the meaning of section 330(a)(1). This should not be difficult in the present case – or perhaps in other similar cases.

Here, E & H has met both of its obligations. First, E & H's services satisfy section 330(a)(4)(A) because the services were necessary for the administration of the case and provided a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owed to E & H for the state litigation work. E & H's services also were not duplicative of services performed by the trustee or other professionals.

Second, E & H showed that this case evinced a "set of circumstances" where litigation was "necessary." The fees awarded to E & H and JPL were part of the bankruptcy court's plan for compensating all attorneys involved in the case. After *Daybreak* was sold, Smith had sought, and the bankruptcy court had granted, an award of attorneys' fees

to McKnight (his new bankruptcy attorney) to be paid from the proceeds of the sale of the painting.[6] The bankruptcy court granted the fee award, but it conditioned the grant of attorneys' fees to McKnight on the grant of fees to the other professionals involved. Thus, it could be argued that Smith agreed to pay the litigation expenses of E & H and JPL when he accepted the conditional grant of fees to McKnight. Further, E & H was successful in defending its fee applications through all appeals and JPL was mostly successful in its defense of its fee awards. Thus, unlike the situation in *Riverside-Linden,* the fee awards to E & H and JPL were meritorious and the fee applications were not filed merely to get litigation fees. *Cf. Riverside-Linden,* 945 F.2d at 323 (holding that "the Bankruptcy Court's denial of fees for expenses incurred by E & H in unsuccessfully opposing their final fee application was not an abuse of discretion"). To deny E & H reasonable compensation for *successfully* defending its fee awards would dilute its compensation for "actual and necessary services." *See Nucorp,* 764 F.2d at 661. Finally, denying E & H and JPL fees for defending against Smith's objections, which the bankruptcy court found were "frivolous," would serve to encourage debtors to file meritless objections to fee applications. This case evinces one of the "sets of circumstances" where litigation of a fee application is "necessary"

---

[6] Smith had to seek approval from the bankruptcy court to pay his attorney because the bankrupt had not been discharged. Thus, the monies from the sale of *Daybreak,* which was used to pay the various fee awards, were not Smith's property to spend as he wished (for example, in pursuit of appeals), but remained the property of the bankruptcy estate and were thus subject to the claims of Smith's creditors, which included E & H and JPL.

for the purposes of section 330(a). Thus, the fees awarded to E & H are affirmed.[7] Whether *Nucorp* or *Riverside-Linden* should have primary application in evaluating the merit of the claim depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court.

3. Fees to John Peter Lee, Ltd.

JPL was awarded fees for preparing its fee applications and for defending its fee awards. For the same reasons discussed in connection with E & H, we also affirm these fee awards. Similarly, JPL was awarded fees for miscellaneous matters, which included opposing Smith's motion to recuse Judge Jones and for seeking the conversion of the case to Chapter 7.[8] These fee awards are

---

[7] Smith also objects to the fee awards to E & H on the basis that Shea & Carlyon, and not E & H, defended the fee awards for work done by E & H in the state litigation. This argument borders on the frivolous since Smith does not allege that Shea & Carlyon is duplicating work done by E & H on the fee litigation or that Shea & Carlyon's fees were excessive. As long as the fee awards are reasonable compensation for services rendered that were necessary and which satisfy section 330(a)(4)(A), it does not matter whether they were rendered by E & H or by its agent. Thus, the bankruptcy court did not abuse its discretion in granting litigation fees to E & H even though E & H hired an outside firm to do the work.

[8] Smith objected to certain of the fees for miscellaneous work because the documentation in support of the fees listed the work under such ambiguous terms as "review of documents" and "research of legal issues." *See In re Ginji,* 117 B.R. 983 (Bankr.D.Nev.1990) (holding that work described in vague terms may be summarily denied). A review of the documentation persuades us that JPL sufficiently detailed the work it performed for debtor's estate. Thus, the bankruptcy court did not err in awarding the fees for the miscellaneous work.

likewise affirmed for the reasons we applied to the application of E & H. In addition to these fee awards, the bankruptcy court awarded other fees to JPL. Smith challenges these fees, and we address his objections below.

a. Fees relating to JPL's defense of its sale of the Masseria Paintings.

JPL had prepared and submitted a fee application with supporting documentation (its "Proof of Claim") for its work as Chapter 11 counsel. During the hearing before the bankruptcy court on JPL's fee application, Smith challenged JPL's handling of the sale of the Masseria paintings, which was part of JPL's work for the estate. Smith now claims that JPL was awarded $23,000 for the time spent in defending its work on the sale of the Masseria paintings against Smith's challenge before the bankruptcy court. Smith argues that JPL's defense of its handling of the sale of the Masseria paintings was neither necessary nor did it provide tangible and material benefits to the estate. The bankruptcy court held that fees incurred by JPL to defend its handling of the sale of those paintings were indistinguishable from the fees generated by JPL in defense of all of its post-conversion claims for fees. The bankruptcy court also found that the work benefitted the estate. Under section 330(a)(6) and *Nucorp,* the preparation and defense of fee applications are actual and necessary services that may be compensated. Further, JPL's work was not unnecessarily duplicative. It also benefitted the estate and was necessary for the administration of the case in determining the scope of JPL's prior work for the estate. Thus, the award of these fees is affirmed.

b. Fees relating to JPL's Suit Against Smith for Abuse of Process.

JPL had sued Smith for abusing the appellate process in filing the various appeals from the fee awards. JPL was granted $22,333, which was one third of the total fees involved in the prosecution of the abuse of process suit. The bankruptcy court awarded this amount after applying *Xebec*. It carefully reviewed the evidence to determine what part of the adversarial proceedings solely benefitted JPL and excluded those services from the fee awards. Although *Xebec* may not be the correct standard to apply in determining attorney compensation, here, by satisfying *Xebec* the bankruptcy court effectively satisfied the standard of section 330(a)(4)(A). JPL's work was not unnecessarily duplicative and the bankruptcy court found that it benefitted the estate and aided in the administration of the case. Although not beyond all doubt, the bankruptcy court did not abuse its discretion in granting this fee award.

c. Fees relating to JPL's Opposition to Smith's Efforts to Obtain Smith's Files.

After JPL withdrew its representation of Smith, he sought to recover his files from JPL to prepare malpractice claims against JPL. JPL refused to return them. The bankruptcy court ordered JPL to release the files to Smith. However, it awarded JPL $4,500, which was calculated as half of the total fees and expenses incurred by JPL in reviewing documents to determine which files belonged to Smith and in copying and transferring those files to Smith. The bankruptcy court did not award JPL fees for time spent in opposing Smith's motion before the court. The fees that were awarded were also supportable under

section 330(a)(4)(A) because they were not unnecessarily duplicative, were reasonably likely to benefit the estate and aided in the administration of the case. This dispute over files can also be viewed as an extension of the fee dispute between Smith and JPL since Smith required his files to prepare the malpractice suit. To the extent that the services of JPL did not relate to the dispute, the bankruptcy court reduced the fees accordingly. Thus, the bankruptcy court did not abuse its discretion in granting this fee award.

d. Fees relating to JPL's Defense of Smith's Malpractice Claims Against JPL.

After he recovered his files, Smith filed a motion to compel the Chapter 7 trustee to file a malpractice suit against JPL. The motion was filed in bankruptcy court because the malpractice suit was a potential asset of the bankruptcy estate. The bankruptcy court ruled against Smith; it determined that the proposed malpractice suit would merely be an extension of the fee dispute between Smith and JPL. Smith appealed this decision, and a Bankruptcy Appellate Panel affirmed. Subsequently, JPL was awarded $50,000 in fees for defending against the malpractice suit. Since we have concluded earlier that awards relating to a fee dispute are compensable under section 330(a)(4)(A) and our earlier caselaw, there was no abuse of discretion in awarding these fees because they were for work that was part of the ongoing fee litigation between Smith and JPL.

B. Motion to Recuse

Smith argues that Judge Jones erred in failing to recuse himself after he allegedly admitted that he was biased against Smith. Smith seeks to have the entire bankruptcy proceeding (including the conversion of his case and the sale of *Daybreak*) voided and a new bankruptcy judge appointed to adjudicate his case.

Smith's proffered evidence of Judge Jones's alleged bias consists of statements concerning a settlement agreement made by Judge Jones at two hearings as well as some adverse judicial rulings. Thus, at a hearing held on February 23, 1999, Judge Jones stated:

> From the very get-go, from the very outset and over the course of many, many hearings, this Court had the clear understanding that the issue of Mr. Smith's interest, whether he had a right to any part of Mitzi Briggs's share and whether he had any right to bring anything, in her name or for those assets would be determined in State Court.[9]

---

[9] Judge Jones went on to state that:

> So any statements by Ms. Allf to the contrary, would have been – and was from time-to-time when she raised it and then appealed the issue as to the meaning of the addendum and the meaning of the agreement, this Court met her argument, on behalf of the debtor, with incredulity and I ask your forgiveness for that statement, but that's just plain fact.
>
> It was always this Court's mind, plain and simple, that that issue would be determined in State Court. And any argument to the contrary, that somehow in the agreement, Mitzi Briggs – in the agreement itself, to resolve these matters in Bankruptcy Court, had assigned the community interest in

(Continued on following page)

Similarly, at an April 9, 1999 hearing, Judge Jones, again speaking of the settlement agreement, stated that he had consistently taken the position that the community property claim had to be tried in state court.[10]

Finally, Smith points to instances of alleged partiality where Judge Jones ruled against him on evidentiary and procedural motions. Smith also points to Judge Jones's alleged bias in finding that some of Smith's appeals, as well as the litigation against JPL, was frivolous. Since these latter alleged instances of bias, however, were not the bases of the recusal motion, we need not consider them here.

Before reaching the merits of this issue, two procedural matters need to be addressed. First, arguments have been made that the appeal is premature. "The decision of a bankruptcy judge not to disqualify himself . . . cannot be appealed until a direct appeal is taken from a final decision adverse to the moving party." *Stewart Enter., Inc. v. Horton (In re Horton),* 621 F.2d 968, 970 (9th Cir.1980). Here, Smith has already appealed final decisions allegedly affected by bias, including the orders approving the settlement

---

this Court. In the agreement in this Court. I just did – simply did not accept.

[10] Judge Jones made the following statements:

[C]onsistently throughout the hearings . . . , I took the strong position against Ms. Allf that that was clearly not the intent of the Court . . . or the intent of the parties, and I insisted that the matter was supposed to be heard and tried in state court as to the community property interest, and there's just no way that the agreement could be interpreted to mean that you were resolving it by stipulation as opposed to trial in the state court.

agreement with modifications and converting his Chapter 11 case to a Chapter 7. However, no appeal could have been taken then from a bias ruling that has only now been made. Therefore, Smith may appeal now, at this his first opportunity, from the denial of his recusal motion. Further, this is the final direct appeal taken from a final decision adverse to the moving party (with respect to disqualification), and the interlocutory decision rejecting the disqualification motion is now appealable.

Second, the bankruptcy court held that Smith did not file his recusal motion timely and that it could be rejected for that reason. It may be true that Smith should have filed or included his recusal motion in prior proceedings, especially if he had made earlier allegations of bias. Smith had notice of the adverse rulings for a long time and it seems improbable that Smith did not know of purported indications of Judge Jones's alleged bias for many years. But Smith argues to the contrary in that he based his motion on Judge Jones's comments at the February and April 1999 hearings, which he alleged were the first indications that he had of Judge Jones's bias against him. The issue of timeliness is not actually one we have to decide. In proceeding to the merits of the motion, we will grant the benefit of the doubt to Smith that he was unaware of any prior evidence of judicial bias, and assume that Smith filed his recusal motion timely.

Smith argues that the district court improperly sustained the bankruptcy court's decision to deny his motion for recusal. The district court analyzed whether Judge Jones should have recused himself pursuant to 28 U.S.C. § 144. This was incorrect since section 144 applies only to district court judges and not to bankruptcy court judges. *See* 28 U.S.C. § 144 (1994); *Seidel v. Durkin (In re*

Goodwin), 194 B.R. 214, 221 (9th Cir. BAP 1996). Rather, bankruptcy court judges are subject to recusal only under 28 U.S.C. § 455. *See* Bankr.R. 5004(a) (1987); *Goodwin,* 194 B.R. at 221.

Section 455 states in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a) (1988).

In *Liteky v. United States,* 510 U.S. 540, 554, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the Supreme Court held that the "extrajudicial source" doctrine applies to all of section 455. In explaining the doctrine, the Supreme Court noted that:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings,* do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. at 555, 114 S.Ct. 1147 (emphasis added). The Court went on to state that the expression of some opinions may support a bias or partiality challenge "if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.*

Smith reads *Liteky* to support the proposition that a judge should recuse himself if: (1) the judge's predisposition was formed in a separate proceeding (which he equates with an extrajudicial source) *or* (2) if the judge's predisposition (whether extrajudicial or intrajudicial) displays a deep-seated favoritism or antagonism that would make fair judgment impossible. This is an incorrect reading of *Liteky.*

First, *Liteky* stated that an opinion derived by a judge from an extrajudicial source is not in itself a sufficient condition for a "bias or prejudice" recusal. *Liteky,* 510 U.S. at 554, 114 S.Ct. 1147. Second, the alleged predisposition in this case was formed during a prior related proceeding, and the Supreme Court requires that for such a predisposition to be a basis for recusal, it must evince a "deep-seated and unequivocal favoritism or antagonism that would make fair judgment impossible." *Id.* at 555, 114 S.Ct. 1147. Therefore, the district court was correct in holding that Smith "can only succeed [in] his claim if Judge Jones's opinions display 'a deep-seated favoritism or antagonism.'" Here, Smith has not presented sufficient evidence to meet his burden.

First, the alleged statements of Judge Jones indicate, at most, that he was disposed to approving the settlement with modifications because he believed that the community property claim, based upon Mitzi Briggs's property claim, should be resolved in state court instead of federal court. There is no indication from Judge Jones's statements that his disposition was fixed from the outset. Rather, the statements suggest that in researching the legal issues relating to the agreement, Judge Jones came to have an inclination – i.e., the "clear understanding" – that the community property issue should be resolved by the state court. Over the course of the many hearings, and

after listening to many arguments, Judge Jones was not persuaded that his inclination was wrong. During the evidentiary hearing on remand, his disposition had become very strong because of the arguments made at the earlier hearing, but there is insufficient evidence to indicate that it was impossible for Judge Jones to change his mind. Even in light of the adverse judicial rulings cited by Smith, there is no evidence that Judge Jones had such deep-seated antagonism or favoritism as to render a fair judgment impossible. The main thrust of Smith's arguments seems to be that Judge Jones made up his mind early and did not change it in the face of subsequent hearings and other proceedings. This is not a ground for recusal. Even if Judge Jones clung to his opinion, a little stubbornness is not ordinarily grounds for disqualification. Thus, the district court did not err in affirming Judge Jones's denial of Smith's motion to recuse.

III.

For the foregoing reasons, the judgments of the district courts are AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re DARREL D. SMITH, Debtor.	
DARREL D. SMITH, Appellant, v. EDWARDS & HALE, LTD., Appellee.	No. 00-17260 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. JOHN PETER LEE, LTD., Appellee.	No. 00-17274 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF; EDWARDS & HALE, LTD., Appellees.	No. 00-16531 CV S-99-1114 JBR **ORDER** (Filed Dec. 24, 2002)

Before: HUG, CUDAHY,* and TASHIMA, Circuit Judges.

The request for attorneys' fees, filed November 26, is granted, and Edwards & Hale, Ltd. is awarded $17,160.00 as attorneys' fees on appeal against appellant Darrell D. Smith. We previously held that "[t]he district court addressed some of the fee awards under the pre-1994 version of section 330(a) because the bankruptcy case here was filed in 1991. We believe that the 1994 version of section 330(a) should apply because the case was converted to Chapter 7 in 1995. The fee awards that Smith is appealing were for services rendered after the case was converted. *In any case, the result under the pre-1994 version of section 339(a) and our earlier caselaw would be the same." Smith v. Edwards & Hale, Ltd. (In re Smith)*, 305 F.3d 1078, 1087 n.4 (9th Cir. 2002) (emphasis added). We also previously denied Smith's petition for rehearing. We see no need to reexamine that holding again.

The motion to recall mandate and request to file second petition is denied.

The supplemental petition for en banc rehearing, received by the Clerk on November 29, and the amendment to supplemental petition for en banc rehearing, received by the Clerk on December 4, have not been filed and shall not be filed, as the filing of such documents is not authorized by any rule.

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

In re DARREL D. SMITH, Debtor.	)	
DARREL D. SMITH, Appellant, v. JOHN PETER LEE, LTD., et al., Appellees.	)	KJD CV-S-99-1114-~~JBR~~ (LRL) **ORDER** (Filed August 24, 2000)

Debtor Darrel D. Smith ("Smith") appeals (#1409) the Bankruptcy Court's order denying Debtor's motion to disqualify Judge Robert Clive Jones. Appellees Edwards & Hale, Ltd. ("E&H"), John Peter Lee, Ltd., and Nancy L. Allf, answered (respectively, ## 1454, 1455 & 1458) Debtor's opening brief (#1451), to which Debtor replied (## 1456 & 1457).

BACKGROUND

Smith alleges that Judge Jones improperly formed an opinion before hearing all the evidence, when Judge Jones was ruling on a settlement agreement. Smith asserts that Judge Jones' action constitutes bias or prejudice against Smith.

Following oral arguments, Judge Jones, on July 16, 1992, entered an order enforcing a settlement agreement,

which matter was appealed. On February 10, 1994, the District Court vacated Judge Jones' order and remanded with instruction to hold an evidentiary hearing. After the evidentiary hearing, Judge Jones enforced the settlement agreement on the same terms as before the evidentiary hearing.

Smith claims that statements made by Judge Jones in three separate hearings are admissions of bias by Judge Jones against Smith. In a hearing held on February 23, 1999, Judge Jones, speaking of his ruling on the settlement agreement, stated:

> From the very get-go, from the very outset and over the course of many many hearings, this Court had the clear understanding that the issue of Mr. Smith's interest, whether he had a right to any part of Mitzi Briggs' share and whether he had any right to bring anything, in her name or for these assets, would be determined in State Court.
>
> * * *
>
> So any statements by Ms. Allf to the contrary, would have been – and was, [sic] from time-to-time when she raised it and then appealed the issue as to the meaning of the addendum and the meaning of the agreement, this Court met her argument, on behalf of the debtor, with incredulity and I ask your forgiveness for that statement, but that's just plain fact.
>
> It was always this Court's mind, plain and simple, that that [sic] issue would be determined in State Court. And any argument to the contrary, that somehow in the agreement, Mitzi Briggs – in the agreement itself, to resolve these matters

> in Bankruptcy Court, had assigned the community interest in this Court. In the agreement in this Court. I just did – simply did not accept.

See #1453, Exhibit 9, Transcript of hearing dated February 23, 1999 (attached as Exhibit 2 to Exhibit 9) at 14-16.

In an April 9, 1999 hearing, Judge Jones, again speaking of the settlement agreement, stated:

> Well, I don't think you need to because I . . . have a pretty good memory of that, and . . . consistently throughout the hearings just for the purposes . . . of the record, I took the strong position against Ms. Allf that that [sic] was clearly not the intent of the Court . . . nor the intent of the parties, and I insisted that the matter was supposed to be heard and tried in state court as to the community property interest, and there's just no way that the agreement could be interpreted to mean that you were resolving it by stipulation as opposed to trial in the state court. . . .

See # 1453, Exhibit 9, Transcript of hearing dated April 9, 1999 (attached as Exhibit 3 to Exhibit 9) at 13.

In a hearing held on June 29, 1999, Judge Jones, speaking of his ruling on the settlement agreement, made the following remarks:

> The first time that I formed an opinion was when Ms. Allf on your behalf sought reinterpretation of – what I thought was reinterpretation of the settlement agreement; that's the only time I formed an impression. I listened long, probably too long, to most attorneys' arguments. And you can rest assured that in most cases, I can't say in a hundred percent of the cases, but in most cases I would not be forming opinions before I walk out

> here on the bench and allowing counsel to argue then for thirty minutes on a matter; that wouldn't make much sense. If I clearly come to opinions early on in the argument or before the argument, then I respectfully try to cut argument off. But otherwise I'm listening to argument, perchance – even if I'm partially converted by the – by the pleadings, perchance counsel will say something to convert me one way or the other otherwise than a ruling simply on the pleadings would produce.
>
> * * *
>
> So that's the first time that I have, for clarity on the record here, of [sic] recollection of forming [a] firm opinion about the nature of your position with respect to the settlement agreement, and it was after I listened to Ms. Allf's arguments on your behalf.
>
> * * *
>
> At any rate, that's when I formed an opinion and expressed it, and that's on the record. So it's not March or April, that opinion would be expressed on the record some years ago; and you have that, its in the record.

See # 1453, Exhibit 11, Transcript of hearing held on June 29, 1999, at 24-26.

Smith alleges that such statements are an admission by Judge Jones that he formed a controlling opinion early in the case before the evidentiary hearing ordered by the District Court. Smith argues that because Judge Jones based his ruling, after remand, on the knowledge and resulting attitudes acquired before remand, Judge Jones'

ruling is the product of a closed mind, and tantamount to actual bias and prejudice.

On June 1, 1999, Smith moved to disqualify Judge Jones. In an order entered on August 5, 1999, Judge Jones denied Smith's motion to disqualify. Smith, now appeals the order denying his motion to disqualify Judge Jones.

DISCUSSION

A bankruptcy court's denial of a recusal motion is reviewed for abuse of discretion. *See United States v. $292,888.04 U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995). Section 144 of Title 28 of the United States Code provides, in the pertinent part, as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor, of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Smith alleges that Judge Jones' bias was the product of judicial proceedings which occurred prior to the evidentiary hearing ordered by the District Court. In *Liteky v. United States*, 510 U.S. 540, 555 (1994), the Supreme Court held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Because Smith alleges that Judge Jones' bias stems from prior proceedings, he

can only succeed on his claim if Judge Jones' opinions display "a deep-seated favoritism or antagonism."

Smith argues that Judge Jones' prejudgement of issues before the evidentiary hearing indicate "a deep-seated favoritism or antagonism." Assuming that Judge Jones' remarks indicate that he formed an opinion before the evidentiary hearing, such an assumption does not mean his opinion was the result of bias or prejudice. An opinion may be wrongful "either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess." *Id.* at 550. The fact that Judge Jones was ordered to hold an evidentiary hearing did not require him to ignore the information he obtained in prior proceedings. The Supreme Court, in *Liteky*, expressly found that opinions formed in prior proceedings almost never indicate bias. *Id.* at 555. While Judge Jones stated that he formed a firm opinion "for the first time" after oral arguments, his opinion was firm at that time because he was ruling on the settlement agreement. Nothing in the record indicates that, upon remand, Judge Jones was not willing to consider evidence presented at the hearing. To the contrary, Judge Jones' statement that he formed a firm opinion "for the first time" indicates that there were times after the "first time" when he formed an opinion with respect to the settlement agreement. The fact that Judge Jones' initial opinion remained unchanged merely indicates that evidence presented at the hearing did not persuade Judge Jones that his "first opinion" was improper. *See United States v. Jenkins*, 141 F.3d 850, 852 (8th Cir. 1998) (a judge's failure to change an opinion held prior to evidentiary hearing does not indicate "deep-seated favoritism or antagonism"). Nothing in the record before this Court indicates that Judge Jones was incapable of rendering fair

judgment due to "deep-seated favoritism or antagonism." Judge Jones' refusal to disqualify himself, therefore, was not an abuse of discretion. Accordingly,

IT IS ORDERED that the Bankruptcy Court's order denying Debtor Darrel D. Smith's motion to disqualify Judge Jones is **AFFIRMED.**

DATED this 21st day of August, 2000.

/s/ Johnnie B. Rawlinson
Johnnie B. Rawlinson
United States District Judge
by Designation*

* Judge Rawlinson, a Ninth Circuit Court of Appeals Judge, is sitting as a District Judge by designation.

United States Bankruptcy Court
District of Nevada
Las Vegas, Nevada

In re:	Docket No. BK-S-91-01026-RCJ
DARREL D. SMITH Debtor	Las Vegas, Nevada June 29, 1999

MOTION FOR APPROVAL OF SETTLEMENT RE PAINTING "DAYBREAK" FOR #3,744,800.14

MOTION TO DISQUALIFY JUDGE JONES FROM CASE

MOTION TO COMPEL JOHN PETER LEE LTD AND EDWARDS & HALE LTD TO DISGORGE ERRONEOUSLY PAID FEES, $290,944.91 OF JOHN PETER LEE, LTD AND $28,798.75 OF EDWARDS & HALE LTD

THE HONORABLE
ROBERT CLIVE JONES PRESIDING
UNITED STATES BANKRUPTCY COURT JUDGE

(Filed July 9, 1999)

COURT RECORDER:	TRANSCRIPTION BY:
JANICE M. CASAROTTO U.S. Bankruptcy Court	NORTHWEST TRANSCRIPTS, INC. Las Vegas Division P.O. Box 35257 Las Vegas, Nevada 89133-5257 (702) 658-9626

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[2] APPEARANCES

FOR THE DEBTOR:

RICHARD McKNIGHT, Esq.
DAVID MINCIN, Esq.
McKnight & Hendrix, P.C.
330 South Third Street, #900
Las Vegas, Nevada 89101

DARREL D. SMITH, In pro per
P.O. Box 93118-100
Las Vegas, Nevada 89193

FOR THE TRUSTEE:

For Tom R. Grimmett:
LENARD E. SCHWARTZER, Esq.
Hale, Lane, Peek, Dennison, et al.
2300 West Sahara Avenue,
#800, Box 8
Las Vegas, Nevada 89102

FOR THE CREDITORS:

For John Peter Lee, Limited:
TIMOTHY P. THOMAS, Esq.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101

NANCY L. ALLF, Esq.
Allf & Rogers
302 East Carson Avenue, #918
Las Vegas, Nevada 89101

For Edwards & Hale, Ltd.:
JAMES PATRICK SHEA, Esq.
Shea & Carlyon
601 South Sixth Street
Las Vegas, Nevada 89101

For U.S. Internal Revenue
Service:
ROLLIN G. THORLEY, Esq.
4750 West Oakey Boulevard
Las Vegas, Nevada 89102

* * *

[19] So those are my responses. Thank you.

RULING OF THE COURT

THE COURT: Thank you, Mr. Smith.

Again, I appreciate that it's a difficult thing to file a motion for recusal, and we just address it as best we can. The Court strives to not take it personally. But I will address these things.

I do think you have waived the motion because of the timeliness problem. And on the merits I don't think that I can sustain it.

Judge Goldwater gave me good advice fifteen years ago when I took the bench, and that is, if people don't want you on the case, get off the case. That's a much easier way to handle it.

But there is also advice given by the appellate courts, and in our own rules, that if you've had a case a long time it's a dereliction of duty to pass it off to another judge unless there are good grounds in a motion to recuse. And I think that's the case here.

First, with respect to the merits of the matter, if the *Leitke* [sic] case stands for the proposition that extra – I think I have to say I don't believe the *Leitke* [sic] case stands for the proposition that extra-judicial sources in a bankruptcy case include hearing other proceedings within the same case. Otherwise, there are few matters that bankruptcy judges could [20] handle, few cases without passing back and forth between several judges the variety of adversary proceedings.

I've got a lot of cases right now, for example, that involve numerous preference actions, separate adversary proceedings in the same case. And the parties must understand when they present a separate adversary proceeding that they take the same judge who has heard perhaps the same insolvency issues time and over again with the – with the same – with respect to the same debtor. If there ever, of course, is a ruling against the trustee in such a case, the trustee would be bound thereafter, there'd be no basis for a ruling.

But in many, many cases the Court forms impressions, of the debtor, for example, of the operations of the debtor, on motions for relief from stay that do influence the Court in subsequent adversary proceedings. That's peculiarly true on motions for fees.

Now I think the instruction from the appellate courts is that counsel cannot simply rely on the file; they do need to put into an application for fees, just as *Ginji* requires, for example, substantiation for the hours they – they've rendered. But I don't think any appellate decision in this area suggests that the Court cannot rely on its own recollection of extensive prior proceedings years past in ruling on fee requests, as long as they're properly substantiated in a – an application.

[21] So I don't think *Leitke* [sic] can be interpreted to mean that extra-judicial source includes hearings or proceedings, or recollection of proceedings in the same case.

I would state for the record that I do not know Mr. John Peter Lee or Ms. Nancy Allf from any extra-judicial source other than Bar hearings or proceedings, with one exception. I, at Ms. Allf's request, I stood in to help perform a marriage for her years and years ago, I think

shortly after I took the bench. Otherwise, the only time that I have known them, other than the thirty minutes involved in that ceremony, has been strictly from Bar association or meetings, and otherwise solely in court.

I don't say this in any derogatory sense for either Mr. Lee's petitions or Ms. Allf's, they both know that I have reduced their fees on many occasions, either because of the rate charged or the fee request or the oppositions. And I don't think I've evidenced, on the merits, any favoritism toward their fee applications generally; and I'm talking about generally, not addressing yet Mr. Smith's case. So for the record, there's no – there is honestly no judicial – extra-judicial source of information or opinion forming regarding Mr. Lee or Ms. Allf.

Now the Court has had, in the sense of *Leitke* [sic], I do think *Leitke* [sic] does include other proceedings the Court has sat on, other cases; I think that is included in their definition. [22] Such that, for example, if I had heard your ex-wife's personal Chapter 11 case there may be reasons why I would have to recuse in listening to your case; that is an extra-judicial source. And here the Court of course was the judge over the – not the Hotel Tropicana case, but the –

MR. SMITH: HCI.

THE COURT: – HCI case, and formed opinions and impressions in that case. We're sitting here at a late, late date of course, and about the best I can do to summarize the opinions or impressions that I had from that case was generally a judicially-obtained-only bias against the Doumanis and against Mr. –

MR. SMITH: Gustafson?

THE COURT: – Gustafson. As a matter of fact, while I did feel – and certainly did not recuse in that case in any extent – to any extent, I probably bent over backwards to make sure I was not ruling in matters in which I would be biased in that respect. And for that – that's a very minor reason, one I've never stated before, there are substantial reasons why I bowed out of some of the disputes in that case and sent them to state court; a very minor reason, I'm sure, in the back of my head, trying to be absolutely frank and open here on the record, stream of consciousness, if you will, for the appellate record purposes, was to send matters to state court where I felt that that kind of a bias – and that's the [23] only bias that I recall in that case – would have influenced the Court's decision. And in one case I sent a matter to the San Diego Probate Court, and Doumani's issue to state court, of course.

One of the issues, too, of course, that I've sent to state court in your own case was your dispute over the community property issue; I sent that to state court. On a personal level, it has absolutely nothing to do with any of my rulings, either in that case or in this case, it would've been delightful to see that you had a community property interest – I'm sure Ms. Allf's firm would have been delighted to see that – and that you could have pursued the Doumani interest obtained from Mitzi Briggs. There was every ground to attack that interest, assuming that you had standing. Basically they resolved their problems by paying everybody, that's how they resolved their problems. And I hope I made it plenty clear on that record that that was – that the result would have been negative to what they did in that case, and that's probably why they decided

to pay everyone rather than have the matters presented to this Court.

So that deals first with the merits, and with respect to any extra-judicial sources.

MR. SMITH: Your Honor?

THE COURT: No, let me finish, please, 'cause I'm trying to address the issues that you've given.

[24] With respect to the three areas that you've addressed on the merits, first and most important is what you said was the Court's impression from the get-go regarding the settlement. I don't know what you mean by "get-go," that's not my word, but I assume what you mean by that is from the beginning, or in – or prior to my listening to any of the motions.

The first time that I formed an opinion was when Ms. Allf on your behalf sought reinterpretation of – what I thought was reinterpretation of the settlement agreement; that's the only time I formed an impression. I listened long probably too long, to most attorneys' arguments. And you can rest assured that in most cases, I can't say in a hundred percent of the cases, but in most cases I would not be forming opinions before I walked out here on the bench and allowing counsel to argue then for thirty minutes on a matter; that wouldn't make much sense. If I clearly come to opinions early on in the argument or before the argument, then I respectfully try to cut argument off. But otherwise I'm listening to argument, perchance – even if I'm partially converted by the – by the pleadings, perchance counsel will say something to convert me one way or the other otherwise than a ruling simply on the pleadings would produce.

So, with respect to that particular issue, my recollection, the same recollection I had for the March-April [25] hearings, as I sit here, is that there was a settlement agreement with Ms. Briggs, there was a big issue with Mr. Doumani, a standing issue as to whether Mr. Smith had any right to attack, we were sending that to the state court, in essence, I had said, that's up to the divorce court. And you reached settlement with Ms. Briggs. I don't have recollection now of the precise language of the settlement, but my remembrance of my impression is, after the hearing where Ms. Allf presented the contrary, is that you had simply left that issue unresolved.

Mr. Smith took the position, represented by Ms. Allf, that the issue was resolved in the settlement against Mr. Doumani. I listened to Ms. Allf's argument on your behalf; it did not make any sense to me at all after reading the language, after listening to the argument, and that's when I formed the opinion, and that's when I expressed it, that's the earliest time that I can express it that I can recall, and I think I chastised Ms. Allf. I think maybe I also thereafter entered sanctions as a result of a subsequent hearing against Ms. Allf and Mr. Smith in taking that position. It wasn't because of any bias in favor of Ms. Allf, and it wasn't because of any bias against Mr. Smith, again whom I have no extra-judicial source to know. My only impressions of Mr. Smith are that he's a CPA and that he's an attorney, and that he knows both accounting and law to a very extensive degree.

[26] So that's the first time that I have, for clarity on the record here, of recollection of forming firm opinion about the nature of your position with respect to the settlement agreement, and it was after I listened to Ms. Allf's argument on your behalf. I will say, as I sit here, I

can even remember today being a little surprised at her position. I think, my recollection is, I can kind of see the image of the parties standing here in the courtroom, my recollection is that I listened very politely, but I had a little surprise as to the position Mr. Smith was taking. I understood why he was taking it, but it seemed contrary to the language and contrary to common sense. Mr. Doumani's involvement, Ms. Briggs' involvement, Ms. Briggs' prior position, her relatives standing here and representatives, all of whom were disclaiming any such interpretation based upon, why would we have advanced such a position when it was clearly contrary to our position in the settlement.

At any rate, that's when I formed the opinion and expressed it, and that's on the record. So it's not March or April, that opinion would be expressed on the record some years ago; and you have that, it's in the record.

The – I have only two other opinions that I'll spread here on the record. One is an opinion that I've announced previously, that some of these appeals were not of worth. Of course to the extent any appeals have been upheld [27] and the Court has been reversed, those appeals were of value, no doubt about that. But the Court had impression, and has announced it previously, it's on the record, that some of your appeals were not valuable appeals.

However, I also stated, and this was in the context of granting fees, both to counsel and to Mr. Smith's counsel, that at some point in time we were dealing with Mr. Smith's money, once all creditors had been paid, and that he was free to pursue those but that he had to recognize that costs would be paid as appropriate, attorneys' fees would be paid as appropriate both to his side and to the

other side, if that's permissible, and I think I gave that caution; again, that's on the record. And the very earliest dates when the Court formed those opinions or impressions is spread totally on the record, and you have those prior hearings.

The only other, quote, unquote, "contrary opinion" that I can recall has to do with your very litigation against Mr. Lee. The only bias that I have in that matter is the same bias I have in all matters, I think there is a bias by all trial judges to want to reduce litigation if possible. That's why we have settlement programs with other judges, that's why we have arbitration programs, that's why we have pretrial conferences, if there's any way possible to reduce the litigation. And it occurred to me that this was at the tail end of a case, this is a '91 case, when basically all we had [28] were fee issues left remaining, we had one very large piece of litigation alleged by Mr. Smith. That was litigation both – going both directions; it was Mr. Smith against Mr. Lee's firm, I think litigation proposed against Mr. McKnight, and it occurred to me that that was not a very productive use of the resources, even Mr. Smith's resources, let alone the Court's resources and opposing counsel's resources. And so I did, pursuant to that same bias that I believe is held by all trial judges to reduce litigation, and for very other substantial reasons which, again, are spread on the record, reduced that litigation substantially. I think what I did is I reduced it from an adversary down to motion issue, is my vague recollection of what was accomplished.

Those are the only biases that I can recollect, and I spread them here frankly on the record. Again, I don't know Mr. Smith from any other source, other than being in here in the courtroom. If I've met you outside the

courtroom, I apologize, I don't recall those events. And the same thing, other than Bar meetings and associations applies to counsel on the other side.

Now there – having said all of that, there is a normal presumption in my mind of the – what do you call it? The – of the normal factors of hourly rate times hours, that's the theory.

MR. SHEA: *Lodestar.*

[29] THE COURT: The what?

MR. SHEA: *Lodestar.*

THE COURT: The *Lodestar* approach. I think the appellate courts tell us, and judges naturally lean towards the *Lodestar* approach and place a bias, to the extent that it's rebuttable, but that's where the presumption lies.

And again, in this case the Court has, I believe, cut drastically Mr. Lee's firm's fees. I know Mr. Smith doesn't see that, and I don't blame you, it's your money that's being spent, although I did caution you about that early, way back when. But, nevertheless, I think there is a presumption in favor of the *Lodestar* approach, where I saw conflicts – conflict of issues – conflict issues, or instances where clearly I had not pre-approved the Lee firm to represent the debtor, I think I disallowed fees in those areas, as well as other areas where there were complaints, and as well as with respect to the hourly rate, I'm sure I made some reduction; and also to costs, some costs.

So I know Mr. Smith has not been enamored of those decisions, but I'll state that there is a bias in favor, I think of most bankruptcy judges, of the *Lodestar* approach, and

assuming they fit within the normal description of services for the debtor, and of course the judge listens to objections.

Now, having said all of that, the last, most important factor is the waiver issue. This is a '91 case. [30] The course – the Court of course had the Tropicana case prior to that, HCI case, and it is an old case. The Court has listened to everything except, as far as I can tell, the attorney fees issues that were up on appeal, and I'm sure I'm gonna get some of those back to – with standards announced by the appellate courts to reconsider.

I think it would be dereliction of duty on my part to hand this to a new judge. If there were separate adversaries, you know, that may be a separate thing, not addressing – it may be that after I consider – I don't think I would recuse on the question of remand or removal of the adversary proceeding, but I'm not ruling for purposes of that adversary proceeding because that may be something separate that I would want to reserve the ruling for and would not feel it a problem if I had to refer it to another judge. But I'm not gonna rule on that with respect to that adversary. But as to the case itself and all of these attorneys' fees matters, the case is about over and it would be a dereliction on my part, I think, to hand this to another judge and say, you go read those two rows of shelves of files to get the impression of what was done in the case, fee requests that have been previously granted or allowed in part or disallowed in part, and do away with the recollection that the Court has of the entire proceedings since '91, and hand that off to another judge.

[31] I think you do have to bring such a matter earlier in the case. I don't fault you for bringing a motion if you believe that late in the case you have finally concrete

evidence of bias of the judge, understand that issue, but I think in this case it just is too late and that the Court is obligated to finish its rulings with respect to the attorney fee issues, the few last issues in the case, right or wrong, which the appellate court can correct.

So for those reasons I do have to deny the motion, reserving it, of course, for any other blossoming areas of litigation in this case, so.

MR. SMITH: Could I get clarification? Just –

THE COURT: Sure.

MR. SMITH: – in referring to this opinion that you had formed in the settlement agreement, you feel that that was a legitimate formation even though it was remanded for an evidentiary hearing. It seems to me that that would be an improper retention of that information to decide the evidentiary hearing, and that would be considered a – basically a predisposition.

THE COURT: I'll give you a clarification.

MR. SMITH: Okay.

THE COURT: I do have to overrule that –

MR. SMITH: Right.

THE COURT: – to the extent that's an objection. I [32] did form an opinion, and it's stated here on the record, after Ms. Allf's argument and when I was required to rule on her motion on your behalf, I did inform – obtain – or receive impressions at that time.

To the extent the appellate court told me to conduct evidentiary hearings, I would have done so; to the extent they told me to use new standards or legal standards, I was required to do so. But the appellate court did not tell me to do away with understandings or recollections or impressions of the proceedings prior to the appellate ruling; I don't believe that I saw that in the appellate ruling. So, again, if I'm mistaken they can correct me, and I announce it clearly for the record that I don't believe that's a proper objection. But I did have impressions received from the prior hearings, even prior to the evidentiary hearings, and hopefully, it's my hope that I kept an open mind based upon the legal standard they gave me and upon the evidence that I received in subsequent hearings. But it's obvious that the impression was the same after listening to whatever you presented, 'cause I'm sure I ruled the same way, so.

Any other clarifications?

MR. SMITH: The only other one, I guess in regards to is on the fees, in the aspect that basically when you started awarding the post- – after they withdrew, the post-Chapter 7 proceedings, and you also awarded them fees along [33] with all the others, which to me, as I understand the law, was clearly not – there was no law to allow it, basically. There was probably no case saying you couldn't but it was – didn't go along with the law. And to me that was – to me, I felt very prejudiced by that, basically. And –

THE COURT: Well –

MR. SMITH: – of course we do not have a remand regarding that –

THE COURT: – to the extent –

MR. SMITH: – today.

THE COURT: – the appellate court has instructed on a new – a new standard, and that's a question I need to ask you, whether that's final, whether there's further appeal, the Court will use that new standard. My impression of the standard at the time that I ruled was, you have the right under Ninth Circuit law to pursue fees expended for obtaining fees. And my impression of the law at the time of those hearings was that that includes appellate work, too. So in other words, if you're required to appeal an allowance, or – or address or defend an appeal of an allowance of your fees, you may also seek further fees for that type of action as well.

To the extent that understanding was incorrect, the appellate court corrects me, and counsel knows and they have to address and meet the standard that the appellate court [34] instructs. But that was my understanding, and my recollection of my understanding of the law at the time. That's what I was trying to do, was to allow them the defense of their fees, or areas that benefitted the estate when they became creditor and no longer representing you on – as debtor's counsel, that even after withdrawal or discharge, they had the right on your behalf, on their own behalf to incur fees to defend their fee application, and on their own behalf as creditor, to the extent they rendered benefit to the estate. For example, when a creditor files a motion to obtain a trustee and it's successful, or a motion to enforce a plan and it's successful, or a motion in fact to confirm a plan which the creditor produces, in those types of instances it's pretty clear that counsel is entitled to fees

and, again, to the extent the Court has corrected the impression.

But I don't think those are biased impressions. If the Court had a misunderstanding of the law at the time it rendered those fee requests, it was doing it according to that misunderstanding. But I don't see that as a bias. Bias is the issue we're addressing right now.

MR. SMITH: I guess one other clarification, and that's the waiver question, I guess, I get to is, I don't know when I could've applied any earlier, and I guess that's my problem. And I understand you'd like it, in all cases today, as early as possible. But you had basically refused [35] certain recusals along the way anyway. So the period in which I could really show anything, if it's appropriate, was at this stage, it seems to me. I'm just – waiver doesn't seem appropriate in this particular case. That's, I guess, my only –

THE COURT: Understand. I think I've already addressed that one.

MR. SMITH: Okay. Thank you.

The only other – one other question. And, where would I need to appeal? Do I need to get an interlocutory or –

THE COURT: You do need an order –

MR. SMITH: An order.

THE COURT: – which you can appeal. Whether it's interlocutory or not, you would normally address that with the appellate court.

MR. SMITH: Oh, okay. Thank you.

THE COURT: Okay. Other matters, please.

MS. ALLF: Your Honor –

MR. McKNIGHT: Just –

MS. ALLF: – excuse me. I believe there's another matter on calendar, may I be excused at this point? Thank you, Your Honor.

THE COURT: Without objection, if there's no objection.

[36] MR. McKNIGHT: Sure.

This brings us to the matter of the motion to compel John Peter Lee and Edwards & Hale to disgorge erroneously-paid fees which we have filed, and this is based on the judgment of the United States District Court, the Honorable Johnnie Rawlinson.

THE COURT: Now, the first question I have for you, Mr. McKnight, has that been further appealed? The reason I –

MR. McKNIGHT: No.

THE COURT: – ask that question –

MR. McKNIGHT: No, it has not.

THE COURT: Has the time to appeal run?

MR. McKNIGHT: Yeah. Well –

MR. SMITH: Thirty days.

MR. McKNIGHT: – thirty days has gone by. We don't think it's – we don't think it's appealable, but thirty

days has gone by without anybody attempting to do anything –

THE COURT: Okay.

MR. McKNIGHT: – if we could put it that way.

The – what Judge Rawlinson took up were approximately fifteen thousand dollars in fees which were granted to John Peter Lee prior to the appointment of the trustee, and the bulk of the fees which were granted afterwards.

Now the first – the first thing that we have to [37] talk about is, we have asked for one proceeding to disgorge the fees with regard to Edwards & Hale and subsequent fee awards to John Peter Lee because Your Honor said that we would take that all up once we had a ruling from the district court. So it's our position that we had that ruling from the district court, we have no right – we had no right to appeal those. If you remember, we asked for a 54(b) certification on one fee award and you denied that and you said, no, we'll take that up when we have direction from the – from the district court.

THE COURT: That's so we could have one appeal and not numerous appeals.

MR. McKNIGHT: Right. Right. And the – we are – we are at that point, I believe. We have that direction from the –

THE COURT: Now the most obvious question I have, Mr. McKnight, is it does not appear to direct disgorgement at this time in the order. What it orders is, specifically, the amended order in part, and denying in part Lee's amended motion for attorney's fees is vacated and remanded for further proceedings consistent with this

opinion. The Court specifically addresses the standard for granting fees –

MR. McKNIGHT: Right. But the order for fees is vacated, which means, in my opinion, we should get 'em back. If it's vacated, there is no award allowing them the fees; so we should get that money returned to us. But the court, the [38] district court did indicate that –

THE COURT: Well, for example, I had a case this morning where counsel had been paid a hundred thousand dollars retainer –

MR. McKNIGHT: Right.

THE COURT: – and he was asking for nunc pro tunc order –

MR. McKNIGHT: Right.

THE COURT: – for approval of fees, and there was a pending adversary by the trustee to –

MR. McKNIGHT: Disgorge that.

THE COURT: – suing him to disgorge that.

MR. McKNIGHT: Right.

THE COURT: I didn't order the disgorgement of the hundred thousand. They sat right – it'll sit there in the trustee – in the trust account of the attorney pending the final resolution.

MR. McKNIGHT: Well –

THE COURT: Is that different from this matter?

MR. McKNIGHT: Oh, absolutely, because they haven't been through appeal. What the court, what the

district court has ordered is that the fee award be vacated. Now, what happens when it's vacated, there's no evidence that this money's in John Peter Lee's trust account.

THE COURT: No, I assume it's been applied to them [39] upon the Court's permission –

MR. McKNIGHT: I would imagine so.

THE COURT: – to their general account.

MR. McKNIGHT: I mean, we really don't know that, but I would presume that they applied it to their – to their bill.

THE COURT: Why –

MR. McKNIGHT: And under *Zeebeck* [phonetic] they would have to come forward –

THE COURT: Why should I order disgorgement until I've held the hearing on what they should ultimately be allowed? As this order directs, it apparently directs me to take the new standard, to hold new hearings – I don't know if it –

MR. McKNIGHT: Well –

THE COURT: – it specifically mentions, but it says, "This case will therefore be remanded for an inquiry into whether JPL's application for attorney's fees and costs should have been approved under the standard discussed." Why should I order disgorgement until I hold that hearing? What if I order disgorgement and create hardship for the firm, I assume, hopefully they stand good to pay it ultimately, but –

MR. McKNIGHT: We don't –

THE COURT: – nevertheless I would think creating hardship, if in fact then I order some of that paid back to [40] them; why should I create that –

MR. McKNIGHT: Well, why don't we –

THE COURT: – circumstance?

MR. McKNIGHT: – why don't we order, since the judge said that it should be vacated, why don't we order them to put that money in a blocked account, so that the money is there in a blocked account and we know that at some point we can get it? And we brought this motion on – you know, if we had not made a motion – this is like the situation where – nothing ever woulda happened. We made a motion to disgorge, and the court, the district court said under *Zeebeck* here's how you figure out whether the services are duplicative services rendered by the trustee, whether they assisted administration. And they've come back and not shown anything in that regard. I mean, some of these fees are patently and clearly for their own benefit, not for the benefit of Mr. Smith or – I mean, when they sued us and were awarded forty-eight thousand dollars – when they sued me and were awarded forty-eight thousand in attorney's fees, that couldn't have been for the benefit of the estate, that was for the benefit of John Peter Lee.

THE COURT: How much total did they ask for in that suit? Wasn't forty-eight thousand, was it?

MR. McKNIGHT: What did they ask for in the lawsuit?

THE COURT: Right.

[41] MR. McKNIGHT: When they sued me I think they asked for 1.6 million –

THE COURT: No, no –

MR. SMITH: 1.6 million –

THE COURT: – as attorney's fees.

MR. McKNIGHT: I think – yeah, I think they – they requested like sixty-five thousand, you cut 'em back to forty-eight. But the forty-eight –

THE COURT: My impression it was a lot more than that, including fees that weren't asked for here; my recollection is that it was a very substantial amount.

MR. McKNIGHT: If it's one dollar, Your Honor, it's got to be returned, because that suit against me was strictly for the benefit of John Peter Lee. Now the court has, the district court has vacated the order. We've had a lot of appeals in this case, and I'll grant you a lot of 'em have been unsuccessful; this one has been successful, and we ought to have a disgorgement of those funds. If you want to say, don't give 'em to Mr. Smith, don't give 'em to the trustee, put 'em in a blocked account 'til we have that hearing, I don't disagree with that sentiment. But those fees, which are in the hundreds of thousands of dollars under just this appeal here, ought to be put in a blocked account.

THE COURT: How much are they?

MR. McKNIGHT: Two hundred and ninety-four thousand [42] dollars ($294,000), of which fifteen come under the pre-*Zeebeck* standard and all the rest come

under the *Zeebeck* standard, which they cannot show that they weren't duplicative of what the trustee was doing.

THE COURT: Now, how do I know they can't show until I hear –

MR. McKNIGHT: Well, they –

THE COURT: – hold the hearing?

MR. McKNIGHT: – why haven't they come forward at this point and said, hold it, wait a minute, you know, applying that standard, here's why they –

THE COURT: No, that doesn't answer my question. Why – how do I know that until I hold the hearing?

MR. McKNIGHT: When do we want to hold the hearing then? I guess we better hold the hearing.

THE COURT: Okay, let's set the hearing. Let's set the hearing.

MR. McKNIGHT: Well, Your Honor, I still must – I really feel that at this point the – the district court judge has vacated that order, and without that order they have no right to hold that money, without segregating, separating, putting in a blocked account in some manner. And it would not follow the district court's order to simply say, well, you can hold onto the money and we won't worry about it until we have a hearing. I mean, I grant you maybe we shouldn't get it [43] right this minute, they shouldn't be forced to cut us a check this minute, but they ought to put it in a blocked account so that we're complying with vacating the order. It wasn't given as retainer, there was nothing consensual here like there was with Mr.

Swanson; his client gave him a retainer on a consensual basis. This money was taken from Mr. Smith over his absolute protestation.

THE COURT: Not from Mr. Smith, but from his estate.

MR. McKNIGHT: Well, from his estate, okay. I mean, I don't want to split hairs in that regard.

THE COURT: These are still –

MR. McKNIGHT: But certainly Mr. Smith –

THE COURT: These are still estate funds.

MR. McKNIGHT: Yes.

Mr. Smith certainly protested and argued against these, fees, so. And Your Honor has indicated that he'll be the ultimate recipient of some of this money, some unspecified amount. Why should we have to wait to have the money put some place where we know where it'll be, until such time as Your Honor makes that decision? And I think in that manner we'll be complying with the court's order.

I mean, I presume then in the Swanson situation, if he was given it as a retainer and he's following the rules, he should be able to say, well, here it is in my trust account; you know, it's in some identifiable place. They've not come [44] forward and said, this is where this money can be found. It's apparently been disbursed.

So maybe we should hear from the other side and then set the matter down for a hearing.

THE COURT: Okay.

MR. SHEA: Good morning, Your Honor, Jim Shea on behalf of Edwards, Hale. I'd just like to point out a couple of things. I think most of the legal arguments are gonna be addressed by Mr. Lee's office.

The appeal that they're talking about did not involve Edwards, Hale. Edwards, Hale's fee application in this regard was not appealed from, so I want to make sure that the Court understands, and Mr. McKnight understands, that when they're talking about an order from Judge Rawlinson saying that that order is vacated, that's not an order with regards to Edwards, Hale fees.

With regards to the denial of the 54(b) certification regarding the fee applications, that they would all be created the same, again my understanding is that was not a hearing that involved Edwards, Hale. I'm concerned, as always, in this case – and unfortunately Edwards, Hale is kind of caught in the battle between the goliaths, if you will, and just want to make sure that we don't continue to incur fees, that they're – that we continue to have to fight about getting and fight to hang onto.

[45] Also, Your Honor, just as a – as a – as a point of clarification, I'm not sure exactly how we're here today, in that I think when you distill Mr. McKnight's motion it's really a motion for reconsideration and I don't know how that's procedurally been brought. Under Rule 59, obviously the Edwards, Hale fee application was granted eight months ago. If they're trying to come back under Rule 60, again that was eight months ago, I'm not sure what the basis for a Rule 60 hearing would be.

Without getting into the merits of the – the appropriateness of the fees, if the court is gonna hold a hearing to determine the fees in light of the standard, if that standard

is going to apply to Edwards, Hale, or to all the fee applications, then I agree with the Court's comments that until such time as you have a determination as to how those fees are juxtaposed against this new standard, disgorgement doesn't make a lot of sense. Because as the Court points out, even if the fees are disgorged and causes financial hardship to the firms, it's just gonna reside with the trustee until such time as the Court decides where it's gonna go. It seem that we just have shifting of funds for no particular reason; they won't inure to anybody's benefit by shifting 'em at this time.

And that's all the comments I have, Your Honor.

THE COURT: Okay.

[46] MR. THOMAS: Your Honor, I've looked at the motion and I agree with Mr. Shea's statements as to how we get here, exactly what this Court's supposed to consider today, and in somewhat trying to prepare for this hearing. But in part, the – the district court has made also a subsequent opinion when Mr. Smith went back asking that this be treated as a direction to the Court to make a distinct order for a certain amount of fees to be disgorged basically, and –

MR. McKNIGHT: No, Your Honor –

MR. THOMAS: – asking for an interest determination. And when he asked for that interest determination, the district court, as I attached as my exhibit, basically said that the bankruptcy court, this Court may be consistent with that district court opinion by finding that no change is required. So as Your – you have pointed out, the end result of this may actually be that no change is required, only that the Court make specific finding in

accordance with the standards and the re-analysis set forth by the district court.

And the district court basically in its – in its ruling basically said that all they want is a distinction of fees prior and after the trustee being appointed, and on the standard of benefit to the estate, which it did not clearly determine from the record.

Now the trustee, if this Court orders disgorgement [47] to the trustee, to be held with the trustee, the trustee has submitted a brief in – basically in the – in the appeal stating that it found that the actions of John Peter Lee were beneficial, so. I mean, I don't' know exactly if that – I think that's probably gonna be – must be addressed with this Court on remand, and I think this Court needs to set a hearing before that so that we can determine, possibly give us direction as to whether we should go back through and do a new Ginji approach, a new complete breakdown.

THE COURT: What would you suggest, both procedurally and timewise? It seems to me from looking at the order you're required to come forward with another pleading that addresses those standards, and then the Court is required to hold – the standards suggested by the district court, and then hold a hearing.

MR. THOMAS: Well, I think that because of the way that this motion, these fees came about – and I think the Court was correct, it came about through that adversary proceeding, and there were two hundred thousand dollars in fees asked for that came out of that. And the Court did make substantial reductions.

But because of that somewhat, I guess confusing record and the court's, the district court's new standard, I would like to have a hearing set, do a new brief based – or a new application based upon – I guess based upon my own change [48] to go back and reassert why each one of the classifications that I did and the analysis I did under the Ginji standard applies to the court's standard, the district court's standard. I would like to go back and redo, not necessarily redo all of the task analysis 'cause I think the task analysis is what it is, I mean, I can't – I'm not gonna reclassify each of those.

THE COURT: I would like to also see what total fees were, including fees that were included in the prior applications, so I have some kind of way to assess what portion of total services rendered were rendered in these categories.

MR. THOMAS: Certainly. What I would think would have to be addressed to the Court is, is what fees were asked for at the time, what fees and analysis were disallowed by the Court, what fees were allowed and what standard [sic] were – I mean, how our arguments and our assertions as to why those fees are compensable meets the standard of the district court. That way the Court would know what had been disallowed, why you had disallowed it.

THE COURT: What would you suggest timewise?

MR. THOMAS: Actually, Your Honor, those fee applications, you know, I don't – I would ask for some direction from the C[illegible] because I somewhat agree with Mr. Shea as to, this Court made that 54(b) certification ruling on [49] a third post-withdrawal fee application of

sorts. I would like a clarification from the Court simply as to – your statement at the time was that there are appeals pending, whether those appeals will – we will address what happened from –

THE COURT: I think –

MR. THOMAS: – those appeals.

THE COURT: – the thing to do now is, is in essence this will be your final fee application – well –

MR. THOMAS: Similar to –

THE COURT: – you'll allege that it's a final fee application; if you believe that there's further fees after this, then so be it. The only one that we can't really cut off is the trustee, 'cause the trustee may be incurring additional fees. But in essence a final fee application, then we'll have the hearing and we'll have a final ruling. And then whatever they think they can appeal, they'll appeal. And if their time has run, so be it; if their time hasn't run, the appellate courts will address whatever in any fee applications should be addressed. The district court has given me a standard here, I'll use that standard.

And I don't know, in response to the Edwards & Hale suggestion that I should address that without a motion, I think Mr. McKnight ought to file a motion to say, either seeking reconsideration, or you won't file such a motion, [50] you'll simply appeal at the conclusion, or the order at the conclusion of this hearing, on the basis that now all fee applications, other than the trustee's, are final.

MR. McKNIGHT: Okay. Well, when he's finished, Your Honor, I'll address that.

MR. THOMAS: Okay. And that would basically be a fee application similar to the fee application that we did leading up to the final pre-confirmation fees where we went back through the entire six or seven fee applications, and then the Court basically made another ruling on the reconsideration of those. And we could do that, I – this is the only remaining issue that, if it goes up on appeal, we would have remaining.

I think that we're argued in front of the Ninth Circuit, there's obviously no briefs left regarding that fee appeal, so I think that –

THE COURT: Yeah.

MR. THOMAS: – it's appropriate to try to do a fee app.

THE COURT: I'm not inviting a ten-inch stack. Your can also just simply recite by date. You can say, we have six fee applications, ten fee applications; you'll refer to the date that they were filed, they're in the file –

MR. THOMAS: Okay. Yeah, that –

THE COURT: – they represent a total amount of such [51] and such, the Court allowed such and such. That's not part of the appeal and you're not required to reconsider that; or these fee applications are part of the appeal, you're required to consider that. So I'm not inviting you to file a twenty-inch document; you can include things by reference. But I am suggesting that you give me an entire picture of the fee applications, and that this would be a final fee application. The Court will do whatever the appellate courts tell me to do, and that way anything and everything that can be appealed at this time will be appealed.

MR. THOMAS: I think that's the appropriate procedural way to deal with it, because there is a second appeal pending with the district court on another one of these ruling from the Court, so I don't know – I don't know what the district court's position is as to that second appeal, but I think it's probably an accurate procedural policy to go back and try to make a final determination as to all of this, because there's some confusion as to 54(b) certification and the appeal-ability.

I would suggest, you asked me about timewise, I would suggest – I guess I'd suggest thirty days to do – to bring that application on, a final application.

THE COURT: Okay.

MR. THOMAS: I don't –

THE COURT: So –

[52] MR. THOMAS: – I don't see any reason why we have to take longer than that.

THE COURT: So within thirty days you'll file it. Is that what you were saying?

MR. THOMAS: Yes. Yes, your Honor.

THE COURT: We'll set it for hearing, and we'll give you a date now towards – sometime in August? Mr. McKnight will want to respond to it. We'll set it towards the end of August, is that acceptable to everyone?

The clerk will give us a date. Okay.

THE CLERK: That'd be August 31st Your Honor.

THE COURT: What time?

THE CLERK: 1:30.

THE COURT: August 31st at 1:30. And counsel will, at the appropriate times required by the rules, file response and reply.

MR. McKNIGHT: Okay, your Honor. With regard to the Edwards & Hale, it is our understanding, and we have cited cases that indicated that until such time as it is final, it's subject to reconsideration. Now I don't know, if Mr. Shea wants to convince the district judge who's already heard the appeal that his appeal is somehow different, then we'll be willing to have a final determination on E & H's fees and we can go through that appeal again. I mean, if that's what he's asking for.

[53] We have brought it before the Court because the district court has announced the standard in this case, and it seems to me it would be the same standard on E & H. Maybe we bit off more than we can chew, maybe we did ask for too much. But there are two hundred and fourteen thousand dollars ($214,000) worth of fees that were granted to John Peter Lee which the court has vacated, the district court has vacated, and has announced the standard on.

Now there's this other appeal floating around in the district court which we view as being the same thing, because there's a vast difference in the eyes of the district judge to the standard to be applied after the trustee is appointed, and that's what she has said in this opinion. So we don't anticipate that that appeal would be any different than this appeal; it would result in the same type of ruling, because it has as its subject matter the same thing.

THE COURT: What appeal is floating around?

MR. McKNIGHT: Well, this fee award was certified, this two hundred and fourteen thousand dollar fee award was –

MR. MINCIN: Right. That was 54(b)'d.

MR. McKNIGHT: That was 54(b)'d, so we appealed and we got this ruling. Then you made another fee award to John Peter Lee which got appealed, and that is floating around in the district court. But it has the same subject matter, post-appointment of trustee fees.

[54] THE COURT: It doesn't involve Edwards & Hale again.

MR. McKNIGHT: That one doesn't involve Edwards & Hale. Edwards & Hale, there's been no 54 – 54(b) certification, so we either need to, (a), wait until there is a final fee award which makes it appealable, or we need to certify that under 54(b). And if that's what they want to do, if they want to go through that appeal, I suppose we could. But as it stands right now, we need to deal with the two-hundred-and-fourteen-thousand-dollars award to John Peter Lee.

Now as far as the previous fee awards, that's up in the Ninth Circuit; we just argued that last, I think it was last Friday.

THE COURT: The –

MR. McKNIGHT: If it wasn't last Friday, it was the Friday before.

THE COURT: The prior awards? The prior awards that went through the district court are now in front of the Ninth Circuit.

MR. McKNIGHT: Right. And that is –

THE COURT: They may –

MR. McKNIGHT: – that –

THE COURT: – they may give us another standard yet.

MR. McKNIGHT: Well, that is for when they were representing Mr. Smith; so that isn't post-trustee, that's [55] pre-trustee. That was during Chapter 11.

THE COURT: Right.

MR. McKNIGHT: So that's a whole different – that's a whole different ball of wax. And I guess the reason we got to the Ninth Circuit on that is because this particular appeal got shortcut in the district court. Okay?

So we would – we would urge that the two hundred and fourteen thousand be deposited in some sort of an interest-bearing account under the order of the Court, 'cause that is clearly what this appeal deals with, and clearly the district court has vacated it.

As far as the hearings go, I have no problem with if they filed something by July 30th. But any suggestion that anything we've done here is incorrect or improper, I think has to fall on deaf ears. Because if we hadn't made this motion, they never would have reapplied; they never would have done anything. Why should they? They just get to keep the money if they don't.

So this is our effort to have them come forward and try to demonstrate, which we don't think they can, try to demonstrate the *In re: Zeebeck* standard. So that's why we brought this motion.

And the additional application to Judge Rawlinson had to do with interest on this money, so. Which the judge wants to see how much is disgorged finally before she makes [56] that decision, apparently.

THE COURT: I honestly think I have to do the same thing. I'm – I'll either deny it without prejudice, or simply defer the disgorgement motion until the hearing on August 31st; I think that's the only fair thing to do. To require them to put up two hundred some-odd thousand dollars in a blocked account when the Court may allow part of it, may allow all of it, may allow none of it, is unfair at this juncture. And we're only two months away; it does not create benefit to Mr. Smith, other than interest, and even that is not a benefit to him since none of these funds can I pay out to Mr. Smith presently. And it is only detriment to the law firm.

MR. McKNIGHT: Well –

THE COURT: So I think I have to deny without prejudice, or –

MR. McKNIGHT: Could we –

THE COURT: Well, let me just finish.

MR. McKNIGHT: Okay. I'm sorry.

THE COURT: or put over 'til the – rather 'til the August 31st date the disgorgement issue.

With respect to Edwards & Hale, that's not part of this order, vacating their fee award. That's why my suggestion is one of two ways to handle that issue. Either, number one, you'll do nothing, but John Peter Lee's [57] application here will be alleged to be a final fee application,

and I'll give a final fee award to them based upon Judge Rawlinson's standard. And then if it's appropriate to appeal at that point in time any and all fee applications, you'll do – you can do so. Or – I'm sure they'll be addressing the finality of those, but it won't be before me, it'll be before –

MR. McKNIGHT: Right.

THE COURT: – an appellate court.

Or you can file, if you want it a little more definite that – than that, you'll file a motion to redetermine their fees based upon the fact that it was an allegedly interlocutory order, and number two, that it's a – determined according to the incorrect standard.

MR. McKNIGHT: Well, that's what we did in this motion, we asked for reconsideration based on the fact that it's not final until there's a final fee application. So I guess what I'm trying to find out from Mr. Shea is, which way does he want to proceed.

THE COURT: Well, I guess it's possible to interpret this motion as a motion for reconsideration. To the extent it is – to the extent it's so interpreted, I'm not saying that I will interpret it that way, but to the extent that it's so interpreted, I'll set it down for August 31st. And you'll need to reply to that issue, and –

[58] MR. McKNIGHT: Okay.

THE COURT: – and Mr. McKnight can argue that this, this and this hourly item in their fee application does not meet the standard established, and therefore we want the Court to reconsider it. And you just – you'll need to address that.

MR. SHEA: As a point of clarification then, your Honor, and I'm not sure procedurally out of this – procedurally out of this quagmire which way to go, but it sounds like where we're – where we're heading towards is that on August 31st it would be in the best parties – the best interest of all the parties to have this resolved, and to get it –

THE COURT: Sure.

MR. SHEA: – get it out of this Court. And if it goes up on appeal, it's gonna go up on appeal –

THE COURT: Right.

MR. SHEA: – but let's get it done.

So I guess the question is, that between now and that time we can either take the position that our previous fee application was a final order that wasn't appealed form and therefore take that position; or if we're just gonna take the gloves off and say, let's just get to the – to the bottom of this, we're gonna have a hearing on the 31st, then what we're able to do is supplement any fee application with any [59] incurred but yet unpaid fees by the end of July, and have that heard. And we just resolve on July 31st who gets paid what, as far as this Court's concerned, based on the standards –

THE COURT: It would be a final order that could – it'd be all that this Court had to do, short of further remand.

MR. SHEA: Okay. And – and I guess that we're reserving the issue of the standard that would be applied on a motion for reconsideration as far as Edwards, Hale because, as we've said, we weren't parties to that appeal.

I'm not sure that we're willing to concede that any ruling by Judge Rawlinson on an appeal that we weren't party to are gonna – are going to govern a reexamination of any fees, yeah, that may be different –

THE COURT: Well, I guess –

MR. SHEA: – to the extent further fees are implied.

THE COURT: – Mr. McKnight's right. We can either leave the pleadings as they are, he's filed a motion with respect to your fees that's also entitled "and Edwards & Hale" and you've responded to it and I can rule on it now; or we can set it down for further hearing and further – after counsel have had further pleadings and/or arguments.

MR. SHEA: Your Honor, we're gonna end up altogether on the 31st one way or the other, I suspect.

[60] THE COURT: Okay.

MR. SHEA: So I would imagine what we'll do is, just procedurally with Mr. McKnight work out a vehicle so we get there on the 31st. And I think the intention of the Court is fairly clear, and that is that we resolve all this by the 31st; and then after that any appeals that take place –

THE COURT: I'll entertain any further pleadings that either side has, and I will rule on Mr. Smith's motion with respect to Edwards & Hale at that time.

MR. SHEA: Thank you, Your Honor.

THE COURT: That way there'll only be one appeal, you only have to do one appeal at one time.

MR. McKNIGHT: Very good, Your Honor.

THE COURT: Either side.

Okay. Thank you.

MR. MINCIN: Thank you, Your Honor.

PROCEEDINGS CONCLUDED AT 12:37 P.M.

* * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

NORTHWEST TRANSCRIPTS, INC.
LAS VEGAS DIVISION
P.O. BOX 35257
LAS VEGAS, NEVADA 89133-5257
(702) 658-9626

GAYLE MARTIN-LUTZ
FEDERALLY CERTIFIED OWNER

/s/ Beverly Siguinch
MANAGER

/s/ Richard L. Kangas
SIGNATURE OF TRANSCRIBER

7/9/99
DATE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re DARREL D. SMITH, Debtor.	
DARREL D. SMITH, Appellant, v. EDWARDS & HALE, LTD., Appellee.	No. 00-17260 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. JOHN PETER LEE, LTD., Appellee.	No. 00-17274 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF; EDWARDS & HALE, LTD., Appellees.	No. 00-16531 CV S-99-1114 JBR **ORDER** (Filed Nov. 14, 2002)

Before: HUG, CUDAHY,* and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges Hug and Cudahy so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

28 U.S.C. §455 Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the

matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re DARREL D. SMITH, Debtor.	
DARREL D. SMITH, Appellant, v. EDWARDS & HALE, LTD., Appellee.	No. 00-17260 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. JOHN PETER LEE, LTD., Appellee.	No. 00-17274 CV S-99-1761 HDM
DARREL D. SMITH, Appellant, v. TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF; EDWARDS & HALE, LTD., Appellees.	No. 00-16531 CV S-99-1114-JBR **ORDER** (Filed Feb. 6, 2003)

Before: HUG, CUDAHY,* and TASHIMA, Circuit Judges.

Darrell D. Smith's "Motion to Recall Mandate and Request [for] Leave of Court to File Second Petition and/or, in the Alternative, Reconsider Order of 12-24-02 with Clarification" is DENIED.

The Clerk is directed to close the file. No further filings will be accepted in this closed case.

---

* The Honorable Richard D. Cudahy, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Supreme Court, U.S.
FILED
APR 11 2003
OFFICE OF THE CLERK

No. 02-1199

IN THE

Supreme Court of the United States

DARREL D. SMITH,

Petitioner,

v.

TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF, EDWARDS & HALE, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JOHN PETER LEE, LTD.

PAUL C. RAY
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

Counsel for Respondent John Peter Lee, Ltd.

180231

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, John Peter Lee, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Statement of the Case 1

I. The Appellate Courts Have Repeatedly Affirmed The Rulings Adverse To Smith, Finding Him To Be Judicially Estopped And Affirming Numerous Fee Awards Against Smith For His Frivolous Litigation. 2

II. Bankruptcy Judge Jones Said That His Intent Was To Be Open Minded And That The Evidence He Heard On Remand Reconfirmed His Impression After Applying The Standards Mandated By The Appellate Court. 4

III. Judge Jones Correctly Explained That The Nature Of Bankruptcy Is That Many Related Proceedings Can Come Up In The Same Case Not Necessarily Invoking The Extra-Judicial Source Rule Discussed In This Court's *Liteky* Opinion. 5

Contents

	Page
Reasons for Denying the Writ	6
I. The Lower Courts Correctly Denied Smith's Motion For Disqualification.	6
II. The Courts Of Appeals Are Not In Conflict With The Decision Below.	7
III. Smith Misrepresents The Importance Of The Issues He Identifies.	9
Conclusion	10
Appendix	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Frates v. Weinshienk, 882 F.2d 1502 (10th Cir. 1989) 7, 8, 9

In Re Joint E & S District Asbestos Litigation, 737 F. Supp. 735 (E.& S.N.Y. 1990) 9

Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) 5, 6, 7, 9

TABLE OF CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

The following related appeals originated from *In Re: Darrel D. Smith*, United States Bankruptcy Court, District of Nevada, Case Number 91-21026-RCJ:

Supreme Court of the United States:

Darrel D. Smith, Petitioner
v.
John Peter Lee, Ltd.; Tom Grimmitt,
Chapter 7 Trustee, Respondents
Case No. 98-542

Cited Authorities

***Court of Appeals for the Ninth Circuit*:**

Darrel D. Smith, Appellant
v.
John Peter Lee, Ltd. Appellee
CV-S-98-01615-HDM(LRL)

Darrel D. Smith, Appellant
v.
Edwards & Hale, Ltd., Appellee
CV-S-99-01761-HDM, BAP 99-1727

9th Cir. 96-15214, CV-S-96-133, BAP 96-1154

CV-S-99-1114, BAP 99-1517

CV-S-97-584-HDM (RLH)

9th Cir. 00-17274, CV-S-98-1615, BAP 98-1721 / CV- S-99-1515, BAP 99-1679 9th Cir. 96-17214, CV-S-96-00133-PMD (RLH)

In Re Smith, 305 F.3d 1078 (9th Cir. 2002), Nos. 00-17260, 00-17274 and 01-16531

***United States District Court District of Nevada*:**

CV-S-92-726, BAP 92-1805

CV-S-92-728, BAP 92-1806

Cited Authorities

CV-S-92-725, BAP 92-1838

CV-S-92-726

CV-S-92-727

CV-S-92-728

CV-S-93-409

CV-S-93-471

CV-S-94-827, BAP 94-2079

CV-S-95-243, BAP 95-1170

CV-S-96-949-LDG (LRL), BAP 96-1850

CV-S-97-27-LDG (LRL)

CV-S-97-28-LDG (LRL), BAP 96-2114

CV-S-97-149-LDG (RLH), BAP 96-2162

CV-S-97-872-LDG (RLH)

CV-S-97-1054

CV-S-97-2104, BAP NV-97-1849

Cited Authorities

CV-S-98-90

CV-S-99-232-PMP (RLH)

CV-S-99-438-DWH (RLH)

CV-S-99-887

CV-S-99-897

CV-S-99-1145-DWH (PAL)

CV-S-99-1515

CV-S-99-1581-DWH (RLH), BAP 99-1707

CV-S-99-2159

CV-S-99-2169

CV-S-00-922, BAP 99-1378

STATEMENT OF THE CASE

Respondent, John Peter Lee, Ltd. objects to Smith's statement of the relevant facts. Smith filed his Voluntary Petition under Chapter 11 of the Bankruptcy Code on March 22, 1991. At the time of the filing of the Petition, the case was assigned to the Honorable Robert Clive Jones. Smith hired the law firm of John Peter Lee, Ltd. to represent him with regard to the bankruptcy, as well as associated litigation that was proposed as a source of funding for Mr. Smith's reorganization plan.

The bases of the litigation were numerous causes of action asserted by Smith to pursue a community property right in the Tropicana Hotel & Casino in Las Vegas, Nevada, which was owned at the time by his then wife, Mitzi Briggs. This litigation was resolved through a global settlement negotiated between Smith and Edward Doumani directly, without the assistance of counsel. The Settlement Agreement became a point of contention when Doumani drafted an Addendum to the Agreement which was not voluntarily signed by Smith.

Judge Jones, in 1992, ruled without the submission of evidence that the Addendum was part of the Settlement Agreement and that any community property right that was asserted through the language of the Agreement would have to be determined by the state courts of Nevada. In July 1994, after the District Court remanded the Settlement Agreement issue back to Judge Jones ordering an evidentiary hearing, Judge Jones listened again to the same arguments, received evidence, and restated his previous order.

I. The Appellate Courts Have Repeatedly Affirmed The Rulings Adverse To Smith, Finding Him To Be Judicially Estopped And Affirming Numerous Fee Awards Against Smith For His Frivolous Litigation.

Judge Jones specifically added in his Findings of Fact and Conclusions of Law on September 7, 1994, the following conclusion of law, paragraph number 4:

> Smith is judicially estopped from obtaining the interpretation of the Settlement Agreement that he and his counsel have sought, in that said interpretation is inconsistent and irreconcilable with the representation and arguments of record that were made and presented to this Court over the course of the several hearings that predate entry of the Order Enforcing Settlement Agreement.

Smith asserts that this ruling was made with bias and prejudice against him. The same factual statements were presented by Smith at the evidentiary hearing as were presented at the non-evidentiary hearing. The Bankruptcy Court ruled that Smith was judicially estopped by his earlier statements. This ruling and the order imposing sanctions against Smith were never reversed. Smith's challenge of this ruling is now barred by the principle of res judicata.

Smith knew or should have known at this time that Judge Jones, in rendering the identical ruling as in the non-evidentiary hearing, made his ruling using judgments and evaluations developed in the prior hearing. Smith should have moved for recusal at that time rather than waiting seven years and receiving numerous rulings on over thirty appeals and other hearings. (*See* Table of Citations of the Official and Unofficial Reports of the Opinions and Orders entered in the case by the court.)

Smith now, after ten years of bankruptcy proceedings, asks this court to disqualify Judge Jones and overturn a decade of rulings made by all levels of the court system.

Prior to the recusal hearing on June 29, 1999, Judge Jones had addressed Smith's oppositions to more than ten separate fee applications by his attorneys for fees incurred on Smith's behalf. Smith filed a motion for recusal which was heard on June 29, 1999. The bankruptcy court found that each of these issues had been addressed in the actions of the attorneys and had been reviewed by the bankruptcy court in Smith's oppositions to attorney fee applications, Smith's objection to claims and his appeals that were taken and resolved against Smith.

In addressing Mr. Smith's allegations that recusal was appropriate in this action in 1999, Judge Jones specified that the only resolved opinion in 1991 was to have the state court decide the community property issues. Judge Jones also stated that, since that time, he found Smith's litigation and allegations to be frivolous and excessive against the law firm of John Peter Lee, Ltd., who had represented the Debtor prior to the conversion of the Chapter 11 Bankruptcy case into a Chapter 7 liquidation. Judge Jones stated at one of the fee hearings on August 31, 1999:

> I expressly agree with the factual assertions set forth in John Peter Lee's brief. . . . And I express in the strongest possible language, to the appellate court and to others, that this really has reached a frivolous, frivolous stage.

(Transcript, p. 2a.) All the fee orders have been upheld and are now final. In the immediately preceding appeal below, the Ninth Circuit Court of Appeals also awarded fees to the only post-argument applicant for fees, which was Edwards & Hale, Ltd.

II. Bankruptcy Judge Jones Said That His Intent Was To Be Open Minded And That The Evidence He Heard On Remand Reconfirmed His Impression After Applying The Standards Mandated By The Appellate Court.

Contrary to Smith's argument, Judge Jones patiently and diligently listened with an open mind to the presentations by both parties, and stated as follows:

> If I clearly come to opinions early on in the argument or before the argument, then I respectfully try to cut argument off. But otherwise I am listening to argument, perchance - even if I'm partially converted by the - by the pleadings, perchance counsel will say something to convert me one way or the other otherwise than a ruling simply on the pleadings would produce.
>
> * * *
>
> . . . But I did have impressions received from the prior hearings, even prior to the evidentiary hearings, and hopefully, it's my hope that I kept an open mind based upon the legal standard they [the district court on appeal] gave me [on remand] and upon the evidence that I received in subsequent hearings.

Judge Jones made these statements which are contained in the Appendix of Smith's Petition at pages 45a and 52a. Judge Jones thereby explained that the procedure he followed was to keep an open mind even though he already had some impressions from the prior bankruptcy proceedings.

Judge Jones' ruling on remand regarding Smith's divorce settlement agreement is final, binding and not properly the subject of Smith's Petition. Smith only later challenged Judge Jones for bias after the ruling on Smith's settlement agreement was res judicata.

III. Judge Jones Correctly Explained That The Nature Of Bankruptcy Is That Many Related Proceedings Can Come Up In The Same Case Not Necessarily Invoking The Extra-Judicial Source Rule Discussed In This Court's *Liteky* Opinion.

Judge Jones explained his practical, common sense view of his responsibility as a bankruptcy Judge to preside over bankruptcy cases as well as adversary proceedings within those cases but not to recuse himself every time he has to rule in an adversary case which may include reference or consideration of events in the underlying bankruptcy case. The top of page 42a of Smith's Appendix, quotes Judge Jones as follows:

> I've got a lot of cases right now, for example, that involve numerous preference actions, separate adversary proceedings in the same case. And the parties must understand when they present a separate adversary proceeding that they take the same judge who has heard the same insolvency issues time and over again with the - with the same - with respect to the same debtor.

Plainly Judge Jones recognized his responsibility to preside over both administrative case matters and adversary proceedings. Smith takes Judge Jones' statements out of context when he argues Judge Jones to disregard the applicability of *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), discussed below.

Smith does not dispute that all of the bankruptcy rulings which he discusses in his Petition are finally adjudicated with no remaining appeals pending and that they are now res judicata. The only fact issue that Smith has preserved now through his more than thirty (30) appeals is the recent issue of Judge Jones' alleged bias.

Smith fails to indicate any substantive matters remaining to be adjudicated even if a different judge were to replace Judge Jones to administer the actual closing of Smith's case now that his appeal rights are exhausted for all of the substantive issues. Smith's dissatisfaction with the numerous bankruptcy court and appellate court rulings against him is not a valid basis for his request to disqualify Judge Jones.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY DENIED SMITH'S MOTION FOR DISQUALIFICATION.

Smith fails to establish bias and prejudice by Judge Jones. This Court stated in *Liteky*, *supra*:

> . . . opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky, 510 U.S. at 555, 114 S. Ct. at 1157, 127 L. Ed. 2d at 491. Smith never met this standard.

The Honorable Johnnie B. Rawlinson, sitting below as a district court judge by designation, stated:

> Nothing in the record before this Court indicates that Judge Jones was incapable of rendering fair judgment due to "deep-seated favoritism or antagonism." Judge Jones' refusal to disqualify himself, therefore, was not an abuse of discretion.

(*See* Smith's Appendix, pp. 37a, 38a.) Smith presents nothing in the record to contradict this finding.

A disagreement over a judge's ruling or a concern about an order that has already been entered is not a basis of recusal. Such disagreement is appropriately handled through the appellate process. *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157, 127 L. Ed. 2d at 490-91. The Ninth Circuit Court of Appeals correctly affirmed the district court and the bankruptcy court's denial of Smith's recusal motion.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH THE DECISION BELOW.

Smith incorrectly argues the Ninth Circuit Court of Appeals' decision below to conflict with the Tenth Circuit Court of Appeals' decision in *Frates v. Weinshienk*, 882 F.2d 1502 (10th Cir. 1989). In *Frates*, the Tenth Circuit Court of Appeals also affirmed the denial of a recusal motion of a bankruptcy judge, reasoning in pertinent part as follows:

> A bankruptcy judge may preside over both the administrative and adversarial portions of a bankruptcy case. See 28 U.S.C. § 157.

* * *

> We also must recognize that "familiarity with defendants and/or the facts of the case that arises from earlier participation in judicial proceedings is not sufficient to disqualify a judge from presiding at a later trial. *In Re Corrugated Container Anti-Trust Litigation*, 614 F.2d 958, 965 (5th Cir.) (footnote omitted), cert. denied, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed. 2d 114 (1980). In many ordinary litigation situations, judges make preliminary decisions on offers of evidence, or make decisions otherwise affecting the parties, that familiarize the judge with the facts in that case or in related cases in which the judge must rule.
>
> * * *
>
> . . . we have carefully reviewed the briefs and exhibits provided us, and we see nothing which convinces us that the bankruptcy judge appears to have prejudged issues involved in the *Frates* and *Rial* litigation or has placed himself in such a position that he will be forced to decide an issue in favor of Kaiser regardless of the evidence presented to him in that litigation.

Frates, 882 F.2d at 1504, 1506. Smith misstates the holding of *Frates* in suggesting it to support his argument that general bankruptcy information in the same case must not be used in evidentiary hearings.

Like the moving party in *Frates*, Smith fails to present sufficient evidence to meet his burden of showing Judge Jones' opinions to display "a deep seated favoritism or

antagonism." *In Re: Smith*, 305 F.3d at 1078, 1093 (9th Cir. 2002) (authored by Judge Cudahy, a visiting judge from the Seventh Circuit Court of Appeals), quoting *Liteky*, *supra*. The Ninth Circuit Court of Appeals follows *Liteky*.

Smith does not conflict with *Frates*, which also expressly affirmed denial of a recusal motion based upon a bankruptcy judge's prior involvement and familiarity with the party's earlier proceedings. No conflict exists among the circuit courts of appeals concerning the reasoning of the Ninth Circuit Court of Appeals and the courts below. Similarly, the decision below does not depart from the accepted or usual course of judicial proceedings.

Smith misstates the law to try to create a conflict among the circuits where none exists. The reasons for granting the petition for writ of certiorari are absent under Supreme Court Rule 10.

III. SMITH MISREPRESENTS THE IMPORTANCE OF THE ISSUES HE IDENTIFIES.

Smith incorrectly argues that this case requires recusal and vacation of orders, citing *In Re Joint E & S District Asbestos Litigation*, 737 F. Supp. 735, 742 (E.& S.N.Y. 1990). First, that opinion denied a motion for disqualification. Second, the case does not mandate vacating any orders. Third, Smith ignores the orders, decisions and opinions in his case which are now are res judicata.

The only issue Smith brings to this court is the disqualification of Judge Jones. Unless Smith seeks to overturn the last ten years of trial and appellate court decisions in his cases, he states no material effect his request

to disqualify Judge Jones would have on his case. (*See* Table of Citations of the Official and Unofficial Reports, *supra*.)

The substantive rulings of the case are res judicata. Smith cites no valid authority for his request that this Court overturn all the final and numerous appeals decided against Smith which are now final and binding upon him. Smith's adversary proceedings have concluded. It is a moot point whether Judge Jones presides over the final administration and closure of Smith's bankruptcy case.

CONCLUSION

John Peter Lee, Ltd. respectfully requests this Honorable Court to enter an order denying Smith's Petition for Writ of Certiorari.

Respectfully submitted,

PAUL C. RAY
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Boulevard South
Las Vegas, Nevada 89101
(702) 382-4044

Counsel for Respondent
John Peter Lee, Ltd.

APPENDIX

APPENDIX

United States Bankruptcy
District of Nevada
Las Vegas, Nevada

Docket No. BK-S-91-21026-RCJ

Las Vegas, Nevada
August 31, 1999

In Re:

DARREL D. SMITH

Debtor

MOTION BY DEBTOR TO COMPEL JOHN PETER LEE, LTD. AND EDWARDS & HALE, LTD. TO DISGORGE ERRONEOUSLY PAID FEES

APPLICATION BY INTERESTED PARTY NANCY ALLF FOR COMPENSATION, $2,337.50 FEES, $166.24 EXPENSES, TOTAL $2,503.74; SUPPLEMENT OF $2337.50 FEES, $166.24 EXPENSES

JOHN PETER LEE, LTD.'S FOURTH APPLICATION FOR COMPENSATION, $57,732.50 FEES, $5,124.02 EXPENSES, TOTAL $62,856.52

APPLICATION BY EDWARDS HALE & HANSEN LTD FOR COMPENSATION FEES OF $16,529 AND COSTS OF $2,036.33, TOTAL $18,565.33

SEVENTH APPLICATION BY RICHARD McKNIGHT FOR COMPENSATION, $47,745 FEES, $3,692 EXPENSES, TOTAL $51,437

Appendix

THE HONORABLE CLIVE JONES PRESIDING
UNITED STATES BANKRUPTCY COURT JUDGE

* * *

I expressly agree with the factual assertions set forth in John Peter Lee's brief, Mr. Thomas's brief filed May 24th, pages 3 through 8. There are both factual and legal conclusions set forth there.

I have extensive memory of the case, of the long proceedings of the case.

* * *

And I express in the strongest possible language, to the appellate court and to others, that this really has reached a frivolous, frivolous stage.

* * * *

FILED
APR 22 2003
CLERK

(3)

No. 02-1199

In The

Supreme Court of the United States

DARREL D. SMITH,

Petitioner,

v.

TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF, EDWARDS & HALE, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DARREL D. SMITH
1806 Rexford Drive #6
Las Vegas, Nevada 89104
702.737.7616
In Proper Person

14 pp

TABLE OF CONTENTS

		Page
A.	Introduction – Core Of Case – Admitted Prejudgment	1
B.	Reliance On Opinion From Vacated Hearings Violates Due Process	3
C.	Admitted Prejudgments Makes Fair Judgment Impossible	5
D.	Actual Actions Control, Not General Concepts	6
E.	Res Judicata Does Not Apply – Smith Is Not Bound By Representations Of Vacated Hearings	7
F.	Dissatisfaction Is Not A Basis For Recusal	7
G.	Smith's "Frivolous" Appeals Have Been Vindicated With Judge Jones' Disclosure Of His Hidden Bias	7
H.	*Frates* Holds That Bankruptcy Administrative Proceedings May Not Influence Adversarial Proceedings	8
I.	This Appeal Is Not Moot	9
J.	Conclusion – "Fair Judgment Impossible"	10

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) 9

Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) 10

Continental Casualty Co. v. Goodwin, 69 P.2d 644 (Okl. 1937) 7

Day v. Amax, Inc., 701 F.2d 1258, 35 U.C.C. Rep. Serv. 1416 (8th Cir. 1938) 3

Franklin Discount Co. v. Ford, 27 N.J. 473, 143 A.2d 161, 73 A.L.R.2d 1316 (1958) 3

Frates v. Winshienk, 882 F.2d 1502 (1989) 5, 8

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 10

Kimble v. Degenring, 116 N.J.L. 602, 186 A. 451 (N.J. Sup. Ct. 1936) 3

Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956) 10

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) 10

Liteky v. U.S., 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) 2, 3, 5

Moskun v. United States, 143 F.2d 129 (6th Cir. 1944) 10

N.L.R.B. v. Phelps, 136 F.2d 562 (5th Cir. 1943) 10

Nohrden v, Northeastern R. Co., 59 S.C. 87, 37 S.E. 228 (1900) 3

Preston v. U.S., 923 F.2d 731 (9th Cir. 1991) 9

TABLE OF AUTHORITIES – Continued

Page

Shaw v. Dorris, 290 Ill. 196, 124 N.E. 796 (1919) 3

Talbert v. Muskegon Construction Co., 305 Mich. 345, 9 N.W.2d 572 (1943) 10

United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) 2

United States v. State of Washington, 98 F.3d 1159 (9th Cir. 1996) 9

OTHER AUTHORITIES

FRCP 60(b)(6) 10

REPLY BRIEF

A. Introduction – Core Of Case – Admitted Prejudgment

Petitioner Darrel D. Smith hereby replies to the brief in opposition to certiorari filed by Respondent John Peter Lee, Ltd. While Respondent has made comments regarding Petitioner's writ for certiorari, Respondent has not denied the salient fact that **Judge Jones relied on opinions from vacated hearings to enforce a settlement agreement, instead of relying on evidence produced at the remanded evidentiary hearing.**

Relying on vacated hearing to enforce a settlement agreement is actual bias resulting from a prejudgment. This violates due process because the settlement agreement was not enforced on evidence presented at the remanded evidentiary hearing. Actual bias requires recusal and vacatur of orders.

The fatal flaw made by Lee and the Ninth Circuit is that they only determined their facts on *initial hearings* (involving motions on malpractice) in which the bias was initially discovered without considering the evidence from the recusal hearing. While these *initial hearings* objectively reveal bias, they might be construed otherwise. However, Judge Jones, during the *recusal hearing*, straight forwardly **admitted** for the record that he formed "the opinion" (p. 47a) to enforce the settlement agreement **only once** during the vacated non-evidentiary reinterpretation hearings, and he states:

> "The *first time that I formed an opinion* was . . . what I thought was reinterpretation [vacated non-evidentiary hearing] of the settlement agreement; *that's the only time* I formed an impression."

See p. 45a. (Emphasis added). During the recusal hearing, he further clarifies that he only formed "the opinion" during the vacated hearing and further *tries to justify* his reliance on his opinions from the vacated hearings. As a consequence, he does not recuse himself because he

believes that he has justified the prejudgment bias. But his attempted justification only emphasizes the prejudgment and bias.[1]

The central issue of this appeal is whether opinions from vacated hearings are a source outside the judicial proceeding at hand. This Court's *Liteky* case unqualifiedly says yes. *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), which states this about the "extrajudicial source doctrine":

> We say that the doctrine was less than entirely clear in its application for several reasons. First, *Grinnel* (the only opinion of ours to recite the doctrine) clearly meant by "extrajudicial source" a source *outside the proceeding at hand* – which would include as extrajudicial sources *earlier judicial proceedings conducted by the same judge* (as are at issue here). Yet many, perhaps most, Court of Appeals considered knowledge (and resulting attitudes) that a judge properly acquired in an earlier proceeding not to be "extrajudicial." (Cites omitted).

---

[1] Since the opinion was only formed ***once*** during a vacated reinterpretation hearing (see p. 45a), it was impossible to form it during the evidentiary hearing. As a result, the settlement agreement was enforced on exactly the same terms as the vacated settlement agreement. See p. 52a. Judge Jones incorrectly believes that vacated hearings can be relied on for rulings in subsequent hearings. Judge Jones makes this clear in his remarks on the record. Judge Jones does not believe that *Liteky*'s "extrajudicial source" applies to bankruptcy proceedings (neither adversary proceedings nor **vacated** proceedings – both were involved in this case). See p. 41a. Judge Jones believes that he could use opinions from vacated hearings because the appellate court did not tell him to do away with them – of course opinions and evidence from vacated hearings are non-existent under the law. See p. 52a. During the recusal hearing, Judge Jones is using recusal terms when referring to his "firm opinion" and "the opinion." See pp. 46a-47a. For remarks that Judge Jones set forth for the record, see his ruling on pp. 39a-45a; also see original Petition.

Liteky, 510 U.S. at 545, 114 S.Ct. at 1152 (Emphasis added). The Ninth Circuit is still making the same mistake.

As a consequence, this Court should allow a writ of certiorari, or this Court should use its supervisory powers over the lower courts and direct the lower courts to consider the admitted prejudgments made during recusal and to follow recusal law as set forth by this Court in *Liteky*.

B. Reliance On Opinions From Vacated Hearing Violates Due Process

Lee agrees that Judge Jones made identical rulings in the remanded evidentiary hearing that he had made in vacated prior non-evidentiary hearings. Lee argues that the identical rulings were justified because the same evidence presented in the vacated non-evidentiary hearing was presented in the remanded evidentiary hearing. While much of the evidence was the same, the evidence presented at the evidentiary hearing was done in a different manner so that its truthfulness could be tested, and in addition, other evidence was presented. The fact that the evidence presented at the vacated hearing was also presented at the evidentiary hearing does not mean that the evidentiary ruling fulfills the due process requirements for a fair hearing. In fact, it has no bearing.

To have a fair hearing, the ruling in the evidentiary hearing has to be based on the evidence presented at the evidentiary hearing. When the proceedings of the former hearings have been vacated and set aside by the order of the court, the remanded hearing proceeds de novo. *Day v. Amax, Inc.*, 701 F.2d 1258, 35 U.C.C. Rep. Serv. 1416 (8th Cir. 1938); *Kimble v. Degenring*, 116 N.J.L. 602, 186 A. 451 (N.J. Sup. Ct. 1936). It must be conducted in the manner in which it would be conducted if there had not been a previous hearing. *Shaw v. Dorris*, 290 Ill. 196, 124 N.E. 796 (1919); *Franklin Discount Co. v. Ford*, 27 N.J. 473, 143 A.2d 161, 73 A.L.R.2d 1316 (1958); *Nohrden v. Northeastern R. Co.*, 59 S.C. 87, 37 S.E. 228 (1900).

The flaw with Lee's argument (and the Ninth Circuit's decision) is that the evidentiary ruling was based on opinions formed during vacated non-evidentiary hearings. Lee does not deny that Judge Jones relied on vacated hearings to enforce the settlement agreement – nor can it. But Lee tries to justify it by arguing that the same evidence was presented at the evidentiary hearing as was presented at the vacated non-evidentiary hearings. Due process does not require that the same evidence be presented at the evidentiary hearing that was presented at the vacated hearing, but it does require that the new ruling be based only on the evidence presented at the evidentiary hearing. It is the balancing of the evidence during the evidentiary hearing that assures a fair hearing. This requires an open mind unencumbered by prejudgments. The purpose of an evidentiary hearing is to have evidence presented so that a decision can be based on it, not on oral arguments of vacated non-evidentiary hearings.

While Lee does not deny that Judge Jones formed his opinion only once during the vacated non-evidentiary hearing, Lee tries to justify this by claiming that Judge Jones hoped to have an open mind. This is fatal for the following reasons:

1. Hoping to have an open mind is not the same as having an open mind as required by due process.
2. At best, having opinions from vacated hearings skews the balancing of the evidence required of an open mind. In reality, having firm opinions from former hearings eliminates an open mind. It makes fair judgment impossible.
3. Having formed "the opinion" only once during vacated hearings, the opinion was *not* determined from the evidence of the evidentiary hearing. *If Judge Jones had finally ruled based on the evidence in the evidentiary hearing, he could have stated so, but he did not.* However, he clearly states that he only

formed "the opinion" once during vacated hearings – no other time.

Judge Jones states that he hoped that he kept an open mind based on the legal standards the appellate court gave him. As Judge Jones states, he did not believe that it gave him any standards, which it did not. All the appellate court did was vacate and remand for an evidentiary hearing. Since there were no special instructions, the hearing had to be de novo. De novo means a new hearing in which the ruling is based on the evidence presented, not on any opinions or evidence of prior vacated hearings.

Judge Jones also believes that *Liteky* does not apply to bankruptcy proceedings, not even vacated hearings. See p. 41a. This is clearly not the law. *Frates v. Winshienk*, 882 F.2d 1502, 1504 (1989). This violates due process because it results in not having a fair hearing.

In addition, Jones made it clear that he believes that he can use prejudgments from the vacated hearing, and he states **"the appellate court did not tell me to do away with the understandings or recollection or impressions of the proceedings prior to the appellate ruling."** See p. 52a (Emphasis added). As a result, Judge Jones believes that an open mind includes evidence and opinions from a vacated hearing. Of course, this contradicts *Liteky*, which requires that each proceeding be based on the evidence presented, especially evidentiary hearings. See *Liteky* at 510 U.S. at 545, 114 S.Ct. at 1152.

C. Admitted Prejudgment Makes Fair Judgment Impossible

Lee incorrectly argues that Smith did not meet the "deep-seated favoritism or antagonism that would make fair judgment impossible" standard set forth by *Liteky* because "[a] disagreement over a judge's ruling or concern about an order that has already been entered is not a basis of recusal." Smith has never considered rulings alone to be a basis for recusal. The basis for recusal is the reliance of Judge Jones on vacated hearings for subsequent rulings.

Both Lee and the Ninth Circuit miss the point because they base their conclusion only on the hearings that initiated the recusal hearing. While the *initial hearings* (regarding malpractice motions) indicate recusal and were the basis for the recusal motion, it could be argued that they were not sufficient for recusal. However, they both ignore the statements made by Judge Jones during the *recusal hearing* (when he makes comments in the record) that he only once formed "the opinion" to enforce the settlement agreement, which was during the vacated non-evidentiary hearings, and he further tries to justify his reliance on the prejudgment. However, this only emphasizes his reliance on the vacated hearings. See footnote 1.

Smith agrees that he cannot base recusal on rulings alone, and that is why he filed the motion for recusal after Judge Jones disclosed that he relied on opinions formed during vacated hearings in order to enforce a settlement agreement. Of course, the reliance on prejudgments violates due process because the evidence presented is not relied on to enforce the settlement agreement, and as a result, this makes fair judgment literally impossible. In fact, this is actual bias and prejudice, which requires recusal and vacatur of orders.

As a consequence, this court should issue a writ of certiorari, *or* this court should invoke its supervisory powers and require the lower courts to consider the admitted prejudgments made during the recusal hearing and to follow current recusal law of *Liteky*.

D. Actual Actions Control, Not General Concepts

While Lee states that Judge Jones sets forth in the record that he generally has an open mind when he listens to oral arguments, Judge Jones makes it clear that he does not always follow this practice. See p. 45a. In any event, what Judge Jones generally does is not the criteria to determine an open mind. An open mind is determined by what he does in a specific hearing. In this case, Judge Jones specifically states that he formed his opinion to enforce the settlement agreement only once during vacated

hearings, not the remanded evidentiary hearing. See footnote 1.

E. Res Judicata Does Not Apply – Smith Is Not Bound By Representations Of Vacated Hearing

Lee claims that Smith is bound by res judicata because of his representations and arguments during vacated hearings. However, representations and arguments made during a vacated hearing are not binding for subsequent evidentiary hearings. *Continental Casualty Co. v. Goodwin*, 69 P.2d 644, 645 (Okl. 1937) (stating "[t]he parties are not bound by admissions made by them for the purpose of the former trial." Cites omitted).

F. Dissatisfaction Is Not A Basis For Recusal

Lee incorrectly argues that Smith should have moved for recusal when he was dissatisfied with identical rulings. However, dissatisfaction with identical rulings alone (or any ruling) is not a basis for recusal. Smith promptly filed for recusal after Judge Jones disclosed that he had relied on vacated opinions for a subsequent remanded evidentiary hearing. This is a basis for recusal based on prejudgments, and it is actual bias, which violates due process.

G. Smith's "Frivolous" Appeals Have Been Vindicated With Judge Jones' Disclosure Of His Hidden Bias

Lee claims that Smith's actions were frivolous and claims that this is confirmed by Judge Jones' holdings. Smith appealed various rulings because he knew that they were wrong. Had Judge Jones disclosed his bias earlier, the various appeals would not have been required. The foundation of the various rulings is based on Judge Jones' bias that flowed from prejudgments involving the settlement agreement. Smith did not know of Judge Jones' hidden bias (whether intentional or unintentional) until he disclosed it. The appeals could have been alleviated had

his bias been known. In any event, Smith is entitled to fair hearings and to pursue his rights until he hopefully receives them. Judge Jones' disclosure of his prejudgment vindicates Smith's action regarding Judge Jones' rulings. If there is a culpable person, it is not Smith but Judge Jones for not disclosing his bias earlier. Since the judicial system created the injustice (by Judge Jones not disclosing his prejudgment), this court should rectify Smith's plight.

H. *Frates* Holds That Bankruptcy Administrative Proceedings May Not Influence Adversarial Proceedings

Lee misstates *Frates*. While *Frates* states that a bankruptcy judge may preside over both the administrative and adversarial portions of a bankruptcy case (as quoted by Lee), the next sentence (which Lee does not quote) states that "*recusal is necessary* if there is evidence of *actual bias*, if the bankruptcy judge by words or actions reasonably appears to have *prejudged adversarial proceedings* over which he is to preside, or. . . . " *Frates v. Winshienk*, 882 F.2d 1502, 1504 (1989) (Emphasis added.). The *Frates* case found no actual bias or prejudgment, and as a result, it found no bias. The pivotal factor in determining bias is whether there is actual bias or prejudgment, not whether a judge can preside over both administrative and adversarial portions of the bankruptcy.

While *Frates* did not show actual bias or a prejudgment, Smith shows that Judge Jones had actual bias because he admitted that he had prejudged the remanded evidentiary hearing by relying on opinions formed as the result of vacated prior non-evidentiary hearings. Due process is violated because *vacated hearings* require a subsequent de novo hearing since vacated hearings are a nullity, and as a result, **opinions based on vacated hearings are based on nothing**. Due process is further violated because the opinions from *non-evidentiary hearings* do not have the safeguards of an evidentiary hearing. As a result, prejudgments and actual bias make fair

judgment impossible, which requires recusal and vacatur of orders.

I. This Appeal Is Not Moot

Lee incorrectly argues that there are no matters left for adjudication. However, there are tax matters to be resolved, and the trustee remains in control of assets that belong to Smith. A reversal of the Ninth Circuit's decision would return those assets and control of this case to Smith, thus enabling Smith to deal effectively with the tax and other problems that the improper enforcement of the settlement agreement caused.

Lee also incorrectly argues that all prior adjudications are final. While Smith has appealed various ruling on legal ground available at the time, Judge Jones did not disclose his bias until after the appeals. As acknowledge by the Ninth Circuit, Smith timely appealed the recusal issue.

Lee's argument that Smith is not allowed to recuse Judge Jones for actual bias because Judge Jones hid his bias until res judiciata made Smith's remedies ineffective is absurd. This would allow cases to be decided without due process of law. If Lee's argument were to be allowed, there would be no confidence in our system of justice because evidence presented would not have to be the basis for determining cases. The absolute fundamental foundation of our system of justice requires that hearings be determined on the evidence presented.

Even after a judgment becomes final, they can be set aside. See *Preston v. U.S.*, 923 F.2d 731, 735 (9th Cir. 1991); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-828, 106 S.Ct. 1580, 1588-1589, 89 L.Ed.2d 823, 836-837 (1986) (stating "that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings," which was the result of disqualification based on due process requirements of the Constitution); *United States v. State of Washington*, 98 F.3d 1159, 1164 (9th Cir. 1996) (stating "[i]f the conflict of interest is ***disclosed only after the judgment becomes final, the***

judgment can be set aside under Rule 60(b)(6). *Liljeberg*, 486 U.S. at 863, 108 S.Ct. at 2204.") (Emphasis added.); and *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956) stating:

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that *fairness requires an absence of actual bias or prejudice* in the trial of the case. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942; *Talbert v. Muskegon Construction Co.*, 305 Mich. 345 348, 9 N.W.2d 572. If this basic principle is violated, the judgment *must be reversed. In re Murchison*, supra; *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *Moskun v. United States*, 6 Cir., 143 F.2d 129, 130; *N.L.R.B. v. Phelps*, 5 Cir., 136 F.2d 562.

(Emphasis added).

J. Conclusion – "Fair Judgment Impossible"

The concept of "fair judgment impossible" embraces the judge more than justice. It shatters justice much of the time. **It does not in this case because the admitted prejudgment literally makes it fair judgment impossible.** However, in too many cases, the frailties of the judge are embraced over justice because another hearing (a fair hearing) is thought to impose too many costs – financially or otherwise. The concept of "fair judgment impossible" does not embrace justice. Impossibility never does. There must be a better concept!

Smith respectfully requests that this Court grant the Petition *or* exercise its supervisory powers.

Respectfully submitted,

DARREL D. SMITH
1806 Rexford Drive #6
Las Vegas, Nevada 89104
702.737.7616
In Proper Person